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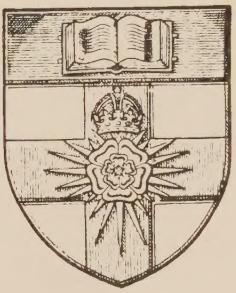

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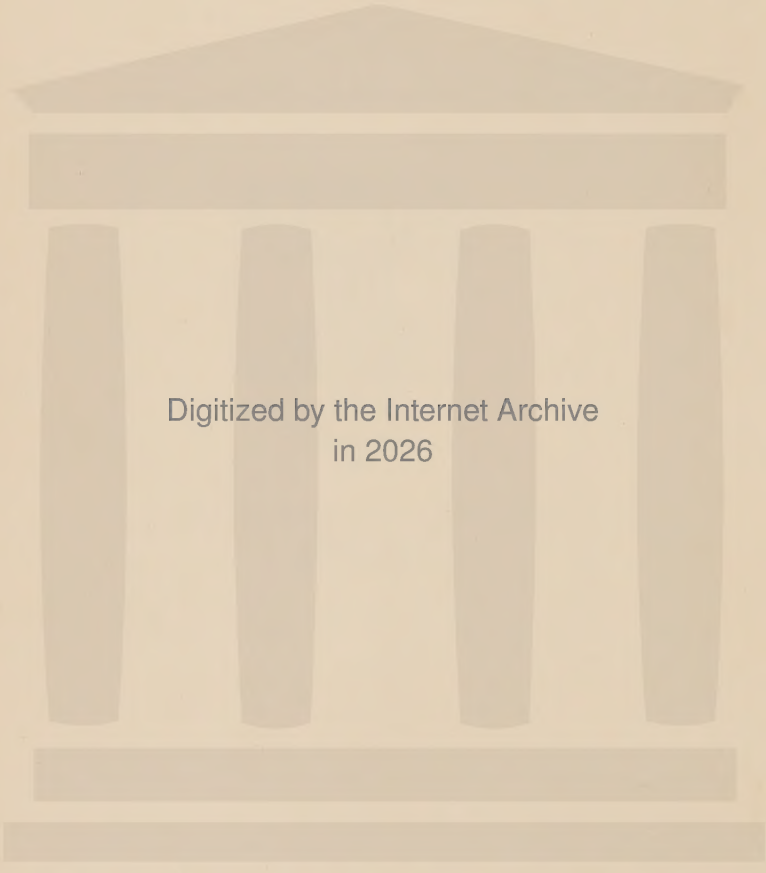

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THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Probate Division.

CASES DETERMINED IN THE

COURTS OF PROBATE AND DIVORCE,

IN THE

ADMIRALTY AND ECCLESIASTICAL COURTS,

AND ON APPEAL THEREFROM IN THE

PRIVY COUNCIL,

AND IN THE

COURT OF APPEAL.

EDITOR—J. R. BULWER, Q.C.

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VOL. VI.

1881.—XLIV. AND XLV. VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1881.

BIBL. LONDIN UNIV.

JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

XLIV VICTORIÆ.

The Right Hon. Sir James Hannen, Knt., President.

The Right Hon. Sir Robert Phillimore, Knt., D.C.L.

JUDGES

OF

THE COURT OF APPEAL.

XLIV VICTORIÆ.

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The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1881, will be as follows:—

In the First Series,
18 Ch. D.

In the Second Series,
7 Q. B. D. 6 P. D.

In the Third Series,
6 App. Cas.

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DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

XLIV VICTORIA.

GOULD *v.* LAKES.

1880
June 22.

Will—Contents—Parol Evidence of Intention.

Statements of a testatrix, whether made before or after the execution of the will, are admissible to shew what papers constitute the will.

THE plaintiff, Robert John Gould, propounded the last will, dated the 1st day of August, 1872, of Dame Martha Rashleigh, of Prideaux, in the parish of Luxulian, Cornwall, widow, who died at Exmouth on the 9th of June, 1879, and he also alleged that the deceased in the will appointed him one of her executors and named him residuary legatee, and that such appointment and nomination were contained in the first sheet of the will and formed part of it. The defendant denied that the plaintiff was appointed executor, or named residuary legatee, or that the words upon the first sheet of the paper formed part of the will, and he alleged that they were written after the execution of it.

5-29

1880

GOULD v. LAKES.

On the death of the deceased, her will was found in her writing desk in an envelope, which had been apparently thrice opened and re-sealed. With the exception of the attestation clause, it was all in her own handwriting, and contained in two sheets of old-fashioned note-paper, one within the other, and stitched together bookwise. Upon the first page of the outer sheet were the words "I appoint my two nephews, Robert John Gould, and Robert Gould Lakes to be my joint executors, to carry my will into effect. I appoint my nephew Robert John Gould to be my executor and sole residuary legatee,

"Martha Rashleigh,

and placed with my will the 1st day of August, 1872.

"Stanley Lodge, Exmouth."

The second side was blank, and the next four pages after the blank page, viz., the whole of the inner sheets, were paged 1, 2, 3, and 4. Page 1 was as follows:—

"The last will and testament of me, Martha Rashleigh, widow of Sir John Colman Rashleigh, Baronet, of Prideaux, in the parish of Luxulian, Cornwall. I bequeath to my nephew John Nutcombe Gould, and to Catherine his wife, the income for their lives of the sum of 5000*l.*, at their death the aforesaid 5000*l.* to be equally divided and given to their children. I bequeath each of their children at my death, the sum of 100*l.*, free of legacy duty. I appoint Robert John Gould, and Robert Gould Lakes as trustees to the above legacy.

"M. R.
"H. H. T.
"W. P. H."

"I bequeath to my niece, Frances Gould, the sum of 100*l.*

"I bequeath to my niece, Charlotte Elliott, widow, the sum of 100*l.*

"I bequeath to my niece, Hannah Nutcombe Gould, the sum of 100*l.*

"Martha Rashleigh."

Pages 2 and 3 were filled with specific legacies, and page 4 was as follows:—

"I bequeath to my stepson, Sir Colman Rashleigh, Baronet, of Prideaux, Luxulian, Cornwall, the sum of 5000*l.*

"I declare this to be my last will and testament, and in witness hereof I hereunto set my hand, and seal this 1st day of August, in the year of our Lord 1872.

"Martha Rashleigh.

"Signed, sealed, and declared to be her last will and testament, by the said Martha Rashleigh, the testatrix, in our presence, who in her presence, and in the presence of each other at the same time, subscribe our names as witnesses:

"Henry H. Tremayne, Manager of the West of England Bank, Exeter; and

"William P. Hart, Accountant, West of England Bank, Exmouth."

The next page of the document, i.e. the inner side of the outer sheet, was a blank, and the outer side of all contained the endorsement:—

"The will of Martha Rashleigh. August, 1st, 1872."

The issues raised on the pleadings were tried by a special jury, before the President, on the 6th of June, 1880.

Neither of the attesting witnesses was able to say whether the will was contained in one or two sheets of paper, or to recollect anything, except that it was duly executed in their presence. Mr. Tremayne who had read the will before its execution, and who had filled up the attestation clause at the request of the executrix, had no recollection whatever of its contents. It appeared, however, that before the execution of the will, the testatrix repeatedly expressed orally and in letters her intention of making her nephew, Robert John Gould, her executor and residuary legatee; and it further appeared from declarations of the testatrix, contained in letters written after the execution of the will, and in declarations repeated by her shortly before her death, that she believed she had given effect to this intention in her will.

Sir J. Holker, Q.C. (*Bayford*, with him), for the plaintiff, tendered the declarations made both before as well as after the execution of the will, as evidence of what were the contents of the will at the time of execution: *Sugden* v. *St. Leonards.* (1)

(1) Law Rep. 1 P. D. 154.

1880

GOULD v. LAKES.

Inderwick (*Searle*, with him), for the defendant, objected to both classes of declarations. The will is in existence, and before the Court, and the case of *Sugden* v. *St. Leonards* (1) does not apply. It is a question of due execution, and no declarations by the testatrix are admissible.

The President ruled that the declarations were admissible for the purpose for which they were tendered.

The jury found their verdict in favour of the plaintiff.

The Court pronounced for the will as contained in the two sheets of paper, and allowed the defendant costs out of the estate, the litigation having arisen from the state in which the testatrix had left her papers.

June 22. *Inderwick* (*Searle*, with him), moved the Court on behalf of the defendant for a rule nisi for a new trial, on the ground of the reception of inadmissible evidence and of misdirection. The question in the case is simply the due execution of the paper, and for that purpose evidence of the intention is inadmissible. Proof of due execution of the will cannot be made by any statement which the testator herself might make. The inference to be drawn from the language of the paper was that the first sheet was written after the rest of the will, and there is no evidence but declarations to shew that it was in existence and formed part of the will when the document was signed by the testatrix and attested by the witnesses. *Sugden* v. *St. Leonards* (1) does not apply. There the question was as to the contents of a lost will; here the documents are in existence, and the Court cannot go beyond the proof which they themselves furnish.

THE PRESIDENT. I am of opinion that there are no statements in the letters written by the testatrix subsequent to the execution of the will which had any tendency to mislead the jury upon the only issue raised for their determination. Her intentions were clear, for it was proved in the letters written both before and after the will that she intended to constitute her nephew residuary

(1) Law Rep. 1 P. D. 154.

legatee, and the question for the jury was whether she had done so by bringing into connection with one another these two sheets of paper before she put her hand to the will. If that be so, how can it be said that any substantial wrong or miscarriage resulted from the admission in evidence of letters in which she shews that her mind continued after the making of the will in the same state in which it was before, namely, that she desired her nephew should be residuary legatee?

On that ground, therefore, I should refuse the rule.

But I am also of opinion that statements made by a testator after the making of the will, not merely with reference to the contents of the lost instrument, but with reference to the constituent parts of it, are admissible. That has been decided by the Court of Appeal in *Sugden* v. *St. Leonards* (1), and there is no distinction between this case, where the question is what formed part of the will, and the case where the whole will is lost. In considering whether or no several pieces of paper constitute the will, evidence would be admissible to shew that it was the intention of the testator to make dispositions in conformity with those which are found upon the several sheets of paper.

The present question is whether these two papers were joined together, or were before the testatrix at the time she signed. But the question of law would not be different if the suggestion were that the first sheet was a forgery or an interpolation by somebody after the event. In such a case could it be said that in order to establish that this sheet was a genuine part of the will evidence could not be given of a statement of the testatrix before she made the will that she was going to dispose of her property in the manner in which it appears to be left in the paper alleged to have been interpolated? And in my opinion it is also the law that statements to the same effect subsequent to the making of the will would also be admissible to shew what was the state of the testatrix's mind and intentions, just as it would be an ingredient in the consideration whether or no a supposed interpolated sheet were a part of the will at the time of the execution.

I think that the case is governed by the decision of the Court of Appeal in the case of *Sugden* v. *St. Leonards* (1), and that any

(1) Law Rep. 1 P. D. 154.

1880

GOULD v. LAKES.

statements of the testatrix whether made before or after the execution of the will—for I see no distinction between them—are admissible in evidence with a view of shewing what were the constituent parts of the will. I therefore refuse the application.

Solicitors for plaintiff: *Geare & Son.*
Solicitors for defendant: *Bell & Stewart.*

June 1.

IN THE GOODS OF DOST ALY KHAN, DECEASED.

Will abroad of a Foreigner—Property in this Country—Letters of Administration founded on a Foreign Decree—Proof of Persian Law.

D. M. K., a Persian subject, was by a decree of a Persian Court declared entitled to certain property in this country. The decree though founded partly upon a will made no mention of it, and the Court which had custody of the will refused to give a copy of it.

The Court of Probate granted letters of administration limited to the property mentioned in a duly authenticated copy of the decree.

The Court allowed the law applicable to the case to be proved by a Persian ambassador.

DOST ALY KHAN, late minister of finance to his Imperial Majesty the Shah of Persia, died on the 29th of March, 1873, at Teheran in Persia, having previously executed a will valid according to Persian law. He left three children, of whom Dost Mahommed Khan was one.

The will as well as all the property of the deceased was, in accordance with the Persian law called the "Sharâ," taken possession of by the Court having exclusive jurisdiction in matters of wills, inheritance and succession. This court is presided over by a class of learned ecclesiastics, called Moojateheds, of whom one is the "Superior Religious Head and the Highest Authority" in all Persia in respect of the said matters, and whose decrees are absolutely irrevocable.

The said "Superior Religious Head" had divided all the property of deceased in the presence of his legatees and heirs, and had in conformity with the "Sharâ" given a document under his hand and seal to each of the persons so interested, specifying the particular part of the property of the deceased apportioned to

such person, and had appointed to the said Dost Mahommed Khan certain property of the deceased (funds standing in the deceased's name in the books of the Bank of England), which was at his death in England, and had given a document marked "A" under his hand and seal.

According to the "Sharâ" neither the original nor any copy of the will is allowed to go out of the possession of the court, nor are the contents of such will published by the court except to and in the presence of the legatees and heirs. There is nothing analogous to probate or administration known in Persia, except the documents so given to each of the legatees and heirs by the Moojatehed under his hand and seal specifying as above mentioned. Such document is the only evidence which is required in Persia, and is sufficient to entitle the person to whom it is given to take all proceedings necessary to get possession of all property therein mentioned.

The document "A" was under the hand and seal of the said superior religious head, and duly verified by the minister for foreign affairs to his Majesty the Shah, and the British minister at the court of Teheran. There was also a translation of the document marked "B," and duly authenticated, the material parts of which were as follows:—

"Let it be known that the whole and entire amount of the money which the late Dost Aly Khan Nizamed Dolé deposited in the bank, whatever sum it may be, both capital and interest, is the undoubted right and real and special property of and belongs solely and entirely to his Excellency Dost Mahomed Khan Moayeral Menalik, and no one else of the heirs has any right whatever thereto."

The facts were proved by, amongst other things, the affidavit of Mirza Aly, also a Persian by birth, and a Mussulman, second secretary to the Persian Embassy at the court of St. James, and of his Excellency General Neriman Khan, a Persian by birth and minister of his Imperial Majesty the Shah of Persia at the court of Vienna, who stated that in Persia there are no professional lawyers, and that the administration of the law is left entirely to the ecclesiastics, who pronounce and perform all judicial acts and

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IN THE GOODS OF DOST ALY KHAN.

decrees, but that all persons in the diplomatic service of Persia are required to be throughly versed in the law, and that therefore he had studied and become acquainted with it.

Dr. Deane (*Gazdar*, with him), moved the Court to decree letters of administration of the personal estate and effects of the deceased mentioned in the decree of the Persian Court (with or without the document "A" annexed), to the duly constituted attorney for the purpose of Dost Mahomed Khan. *In the Goods of Sidy Hamet Benamor Beggia.* (1)

THE PRESIDENT (Sir James Hannen). In this case the affidavit of General Neriman satisfies me that the gentleman who deposed to the Persian law was, and is, from the position he has occupied, competent to give evidence to the Court upon that subject.

I therefore accept his statement of the law, and the result seems to be this. By the law of Persia representation of the estate of a deceased person is not recognised, but the person entitled beneficially to the property of the deceased takes directly from him, though by the decree of the competent court. In this particular instance the competent court has declared that the present applicant is entitled to certain funds which are deposited in the Bank of England. The mode in which I shall carry out that which is necessary according to the English law with reference to the Persian law will be by directing that administration be granted to the applicant, limited to the property which is referred to in document "B."

Solicitors: *Freshfields & Williams.*

(1) 1 Add. 340.

STOCKIL AND OTHERS *v.* PUNSHON AND OTHERS. 1880

Codicil—Incorporation. *Nov.* 13.

Semble, a document containing the words, "This is a third codicil to my will," is not incorporated in a codicil of subsequent date by the words, "This is a fourth codicil to my will."

SIR ISAAC MORLEY, late of Beechfield, in the county of York, Knight, died on the 1st of December, 1879. On the 31st of August, 1872, he made a codicil to his will, and thereby bequeathed a sum of 2000*l.* to the trustees of the Doncaster Grammar School for the purpose of founding a scholarship to be called the "Morley Scholarship." On the 11th of December, 1876, he made another will revoking the previous will and codicil, and on the same day he also made a temporary codicil by which he provided that the codicil for founding the Morley Scholarship should remain in force until he executed another codicil for the same purpose. He subsequently signed six other codicils, the third of which provided for the Morley Scholarship, but this codicil was by inadvertence not signed by one of the attesting witnesses. Each codicil commenced with the words, "This is a first codicil;" "this is a second codicil," and so on throughout the six codicils.

The executors propounded the documents, and asked for probate either of the third codicil as incorporated in or confirmed by the subsequent codicils or of the temporary codicil of the 11th of December, 1876, and the codicil of the 31st of August, 1872, as incorporated and confirmed by it. All the residuary legatees had been made parties to the action, but had not appeared.

Dr. Tristram, for the plaintiffs, the executors. It is true that the only words in the subsequent codicils that would incorporate the third codicil are contained in the commencement of those codicils, i.e., "This is a fourth," "This is a fifth," "This is a sixth codicil," but these are sufficient: *Ingoldby* v. *Ingoldby* (1); *Burton* v. *Newbery*. (2) It is however immaterial to the parties whether this codicil is pronounced for, as the temporary codicil reviving the earlier one is to the same effect.

(1) 4 Notes of Cases, 493. (2) 1 Ch. D. 234.

Explained Re Hall Stockil 30/1

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STOCKIL v. PUNSHON.

THE PRESIDENT. As there is no opposition, and it makes no difference whether the so-called third codicil is pronounced valid or invalid, I shall act upon the impression which I have formed, that the mere enumeration of the fourth, fifth, and sixth codicils is not sufficient to incorporate that document, and I shall decree probate of the temporary codicil of the 11th of December, 1876, and the document of the 31st of August, 1872, which is incorporated and confirmed by it.

Solicitors for plaintiffs: *Van Sandau & Cumming.*

May 5.

KNAPP *v.* KNAPP.

Petition filed after Desertion for a few Months—Second Petition after Desertion for Two Years.

A wife's petition for dissolution of marriage by reason of cruelty and adultery was, by leave of the Court, withdrawn, and petition afterwards filed for dissolution of marriage by reason of the same adultery and also by reason of desertion for two years, which had not accrued at the date of the first petition.

THIS was a wife's petition for dissolution of marriage. The parties were married on the 18th of September, 1867, and were living together in November, 1876, at Dartmouth, when the petitioner, with the consent of her husband, went to visit some friends at Gateshead. On the 2nd of January, 1877, the respondent eloped with a Miss Sutton, and on the 16th of April following his wife filed a petition for dissolution of her marriage by reason of her husband's cruelty and adultery. No appearance was entered on behalf of the respondent. The case came on for hearing before the Court itself on the 22nd of November, 1877, but it being doubtful whether the charge of cruelty could be sustained, the petition was withdrawn by leave of the Court, and another petition filed on the 12th of February, 1880, alleging desertion as well as adultery. This petition was served on the respondent at Bedford on the 25th of February, 1880, at which date he was still living with Miss Sutton. He did not appear in answer to this petition.

Inderwick (*Bayford,* with him), for the petitioner.

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THE PRESIDENT:—It is clear that at the time when the respondent left his wife, eloping with another woman, he deserted his wife, and if that state of affairs continued for two years, the petitioner would have been entitled to institute a suit for dissolution of marriage. It is true that she did institute a suit for dissolution of marriage upon the grounds of cruelty and adultery, and for some time before two years had elapsed was seeking to have her marriage dissolved; but that is not inconsistent with her afterwards abandoning that suit, and after having waited the requisite time, instituting another suit on the ground of her husband's adultery and desertion. There never was a time at which the petitioner was bound to go back and live with him, because she was always justified in refusing to do so as long as he continued to live with the woman for whose company he had abandoned her; and therefore as it was in the beginning desertion on his part, and the circumstances have never been changed, that state of things, which was a desertion in the first instance, has continued such for now more than two years, and consequently the petitioner is entitled to succeed. I therefore pronounce a decree nisi with costs, and the custody of the children of the marriage.

Solicitors: *Crowder, Anstie, & Vizard.*

WICKHAM *v.* WICKHAM.

June 8.

Decree Nisi—Re-marriage before Decree absolute.

A. R. W. obtained in 1868 a decree nisi for dissolution of her marriage, and in 1871, believing that the decree had been made absolute, she married again.

The Court, the Queen's Proctor not opposing, made the decree absolute.

ALICE RUTH WICKHAM obtained a decree nisi on the 17th of June, 1868, by reason of her husband's cruelty and adultery. Her solicitor (since deceased) told her on the day the decree nisi was pronounced that her attendance would not again be required; that the making of the decree nisi absolute was a matter of form, and he would attend to it. On the belief that all things necessary had been done, and that the decree nisi had been made

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absolute, the petitioner on the 17th of September, 1871, went through a ceremony of marriage with another man. She did not become aware until the 8th of May, 1880, that the decree nisi had not been made absolute, and that her second marriage consequently was invalid.

Searle, for the petitioner, moved the Court to make the decree nisi absolute.

Gorst, for the Queen's Proctor, did not oppose.

THE COURT made the decree absolute.

Solicitor: *The Queen's Proctor.*
Solicitor for petitioner: *H. C. Coote.*

June 22.

BAKER *v.* BAKER

Dissolution of Marriage—Lunatic Petitioner—Committee.

The lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage.

Such a suit may be instituted by the committee of the lunatic.

THIS was an appeal to the full Court, consisting of Lord Coleridge, the President, and Sir R. J. Phillimore, from a judgment of the Right Hon. the President, overruling a demurrer to a petition presented by the committee of the estate of a lunatic for a dissolution of the lunatic's marriage.

The facts and arguments are reported, ~~ante~~, p. 142.

The same counsel appeared as in the Court below.

Their Lordships affirmed the judgment, and for the same reasons.

Solicitors for petitioner: *Thomas White & Sons.*
Solicitors for respondent: *Surr, Gribble, & Bunton.*

HALFEN, otherwise BODDINGTON *v.* BODDINGTON. 1881 *March* 1.

Nullity—Application by Respondent to make Decree absolute.

The Court will not upon the application of the respondent make a decree nisi absolute for nullity of marriage by reason of the impotence of the respondent.

On the 10th of March, 1880, the petitioner, then calling herself Emily Caroline Boddington, filed a petition alleging that she was on the 23rd of October, 1879, lawfully married to Thomas Boddington, and praying for a restitution of conjugal rights.

The respondent filed an answer alleging divers acts of violence on the part of the petitioner, and praying for a judicial separation. The cause was set down for trial, but before the hearing the petitioner agreed to substitute for her previous petition a petition for nullity of marriage by reason of the respondent's impotence. This was accordingly done, and on the 4th of August, 1880, the petition for nullity was heard in camera and a decree nisi of nullity pronounced. Subsequently the petitioner refused to make the decree absolute, and on the 8th of February, 1881, applied that her petition might be dismissed or that the decree should not be made absolute. This was opposed on behalf of the respondent, and leave was given for him to apply to make the decree absolute, but the Court directed that the Queen's Proctor should have notice of the application. The Attorney-General declined to direct an intervention, and no one else having appeared to shew cause to the contrary, on the 1st of March,

Inderwick, Q.C., and *Pritchard* moved the Court on behalf of the respondent to make the decree absolute. *Ousey* v. *Ousey* (1) does not apply. There the Court refused to make at the request of the respondent a decree nisi for dissolution of marriage absolute, but the Court's jurisdiction in such cases is defined by the statute, which in terms gives the power only to grant the relief at the prayer of the innocent party. Here the authority is that which was inherent in the ecclesiastical courts. In *Norton* v. *Seton* (2), though the Court refused to decree a nullity of marriage at the

(1) 1 P. D. 56. (2) 3 Phillim. 147.

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suit of the impotent person, it refused upon other grounds than that he was the complainant. In cases of consanguinity, affinity, or bigamy, though the wrong-doer seeks the aid of the Court and great hardship is often inflicted, the Court nevertheless annuls the marriage: *Miles* v. *Chilton.* (1)

Bayford, contrà. The language of the statute, 36 Vict. c. 31, puts decrees nisi for dissolution of marriage and decrees nisi for nullity of marriage upon the same footing, and therefore *Ousey* v. *Ousey* (2) is directly applicable. The distinction between void and voidable marriages is clearly explained by Lord Penzance in *A.* v. *B.* (3), and governs this case.

Inderwick, Q.C., in reply.

THE PRESIDENT. It is not necessary for me now to express an opinion upon the very difficult question, whether or no a suit can be instituted for a decree of nullity of marriage by the husband in whom the defect is alleged to exist. That may be properly raised before me in a suit for that purpose, but in the present state of things I am of opinion that the respondent is not entitled to have the decree made absolute. His wife, who was the complaining party, obtained a decision in her favour; but before the operative decree of the Court had been pronounced she desired to discontinue further proceedings in the case, and the respondent, who has up to this time always resisted her claim, now comes forward and asks the Court not to grant her prayer, but to make the order which she originally asked for, but which she now withdraws from asking. This is contrary to all precedent. I am not aware of any case in which the defendant in a suit has been allowed, because it suited his purpose, to ask that a decree should be made against him.

I have already stated, in the case of *Ousey* v. *Ousey* (2), the reasons which led my mind to the conclusion that in ordinary suits for dissolution of marriage the respondent cannot call upon the Court to pronounce a decree upon the petitioner ceasing to desire it, and I am of opinion that the principle of that case governs the present. The decree nisi in suits for nullity has been

(1) 1 Robertson, 684. (2) 1 P. D. 56.
(3) Law Rep. 1 P. & D. 559.

interposed between the hearing of the cause and the final decree, in precisely the same manner as it exists in suits for dissolution, and the pronouncing of the decree absolute is as much a final step in the one case as in the other, and it is, therefore, competent for the petitioner before that final step in the cause has been taken to withdraw from the suit, and say "I no longer require that the Court shall give me the relief for which I formerly asked." It works no injustice, as it enables the respondent to have all the advantage which he could have had in the suit. He is entitled to have the petition dismissed for want of prosecution; he is entitled to put an end to any obligation imposed upon him in the course of the suit, as, e.g., an order for alimony, and, of course, he will be entitled to make any application which he may be advised to make on the subject of costs. In all this he is in no way damnified by being limited to asking that the petition be dismissed, while at the same time it leaves it open to him, if he should be so advised, to institute a separate suit for a decree of nullity of marriage upon the grounds which have been brought forward in the case.

The application on the part of the respondent that the decree nisi be made absolute must therefore be dismissed.

Solicitors for petitioner: *Lewis & Lewis.*

Solicitors for respondent: *Sandilands, Humphry, & Armstrong.*

NOTE.—In this case the petitioner afterwards again changed her mind, and asked that the decree might be made absolute, and this was accordingly done.

1881
March 15.

Ex parte BRUCE.

Divorce—Affidavit verifying Petition sworn by the Solicitor—Practice.

A petitioner in a divorce suit being on military service, and unable to make the usual affidavit verifying the petition, the Court allowed the petition to be filed if verified by the affidavit of his solicitor, but ordered that the petitioner's affidavit should also be filed as soon as possible.

This was a petition by a husband for dissolution of marriage.

It appeared from the affidavit of his solicitor that the petitioner is a surgeon-major in her Majesty's Bombay army, and was with the Afghanistan field force stationed near Kandahar, and that there was no person in or near that place before whom the usual affidavit accompanying the petition could be filed, the nearest official being several days' journey from Kandahar, and that the petitioner could not obtain leave of absence to go there.

Bayford, for the petitioner, applied either that the affidavit might be sworn before the judge advocate-general attached to the Afghanistan field force, or that the petition might be filed without the affidavit.

The President. The petition may be presented if it is verified as far as practicable by the solicitor for the petitioner, but the usual affidavit must be sworn by the petitioner as soon as it is possible for him to do so.

Order accordingly.

Solicitors for petitioner: *Hollams, Son, & Coward.*

IN THE GOODS OF MAYD.

1880
Dec. 14.

Will—Conditional.

A testator being about to travel, made his will, which contained the following words:—"On leaving this station for T. and M., in case of my death on the way, know all men this is a memorandum of my last will and testament:"—

Held, that the will was not contingent upon his death before arriving at T. or M. Will admitted to probate.

JOHN GEORGE SUFFIELD MAYD, late of Cooper's Creek, Queensland, Australia, deceased, died on the 4th of May, 1879, at St. Kilda in Victoria.

Among his papers after his death was found the following:—

"Canada Five per Cent. . . .	1400*l.*
New Zealand	500
West Hartlepool Railway . . .	900
India Four per Cent.	1000
New Three per Cent. Consols . .	85
Great Eastern Railway . . .	735
Mrs. May's Bank, Victoria . . .	400
	5020*l.*

"Eulbertie Station, Cooper's Creek, Queensland.

"23rd August, 1878."

"On leaving this station for Thargomindah and Melbourne, in case of my death on the way, know all men this is a memorandum of my last will and testament.

"I leave my wife, Robina Mayd, and my brother, William Mayd, barrister of the Inner Temple, London, and now recorder of Bury St. Edmunds, in the county of Suffolk, England, my sole executors of said will. As long as my wife Robina Mayd remains unmarried, and no longer, said Robina Mayd is to have the control of the interest of the above five thousand and twenty pounds invested as above, to be applied for the maintenance and benefit of herself and children—Emily Elizabeth, my daughter, John Herbert Mayd, my second and youngest son, and, if it be required, my eldest son, Jeffray Mayd, with the advice of the said William Mayd, barrister.

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IN THE GOODS OF MAYD.

"It is to be clearly understood that I wish my property to be for the benefit of my wife and children, and on my wife's death, the capital to be divided into four parts, namely, one-quarter to William Jeffray Mayd, one-quarter to John Herbert Mayd, one-half to Emily Elizabeth Mayd, &c., &c.

"Signed this 23rd day of August, 1878, &c., &c."

The document was duly executed as a will.

The deceased was entitled to the interest for life of a sum of 5000*l.* with a power of appointing the same amongst his children.

The deceased joined his wife in Melbourne having completed the journey mentioned, and the will was sent to him from Cooper's Creek by the friend with whom he had deposited it. He kept it in his desk, and on several occasions subsequently spoke to his wife about the contents. He never made any other will or otherwise exercised the power of appointment.

Inderwick, Q.C., moved for probate. The words used are certainly equivocal, but are not such as to make the will conditional: *In the Goods of Dobson* (1); *In the Goods of Porter.* (2)

THE PRESIDENT. I am of opinion that I ought to grant probate of this will. The meaning of general phrases of this kind is, "knowing the uncertainty of human life, and being about to enter on something particularly dangerous, I make this my will," and the Court ought not to scrutinise such expressions with too great nicety. *In the Goods of Porter* (2) the words were: "Being obliged to leave England to join my regiment in China, and not having time to make a will, I leave this paper containing my wishes and desires. Should anything unfortunately happen to me while abroad, I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter, whether in lands, goods, clothes, chattels, or money to be equally divided." Lord Penzance says that if the will had stopped at the end of the first sentence it would have fallen within the first class of cases to which he referred, and that is where it does stop in this case, i.e., at the end of the following sentence:—"On leaving this station for Thargomindah and Melbourne, in case of my

(1) Law Rep. 1 P. & D. 88. (2) Law Rep. 2 P. & D. 22.

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IN THE GOODS OF MAYD.

death on the way, know all men this is a memorandum of my last will and testament." In this case there are no such words as those relied on by Lord Penzance, as leading to a different conclusion, namely, those in which the testator said, "I wish everything that I may be in possession of at that time," i.e., at the time of his death abroad, to be divided; I therefore admit the will to probate.

Solicitors: *Young, Jones, Roberts & Hale.*

IN THE GOODS OF WILLIAM EWING, DECEASED.

1881

Jan. 25.

Assets in Scotland and England—Will proved in Scotland only—Right of Legatee to insist upon proof in England.

W. E. died possessed of property of small value in this country, and entitled under the will of J. O. E. to large assets in Scotland, which were being duly administered there. The executors of W. E. proved his will in Scotland only. G. W. H., a legatee under W. E.'s will, applied for a grant of administration of the estate of W. E. in this country, which application was opposed by the executors:—

Held, that the Court is not bound to make such a grant, but that its power is discretionary:

Held, also, that it not having been shewn that the executors were not doing their duty there was no necessity for any grant in this country. Application refused.

A similar application was made by another legatee upon the ground also that such a grant was necessary to substantiate proceedings in Chancery.

Application refused, on its being proved that the grant was not necessary for the suit in Chancery.

WILLIAM EWING, late of Calcutta, in India, merchant, deceased, died on the 26th day of December, 1878, at Umballa, a bachelor.

The deceased made his will on the previous 23rd day of December, and therein named his uncles, Archibald Orr Ewing and William Ewing, his executors, and bequeathed the sum of 10,000*l.* (part of his share of the residuary estate of his uncle, John Orr Ewing) to his friend George Wellesley Hope, and the sum of 30,000*l.* (another part of such share) to his stepmother, Sarah Jane Ewing. The residue of his estate was not disposed of.

The property of the deceased consisted of a few articles of

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IN THE GOODS OF EWING.

trifling value in India, some books in England, valued at 15*l.* 16*s.*, and a reversionary interest in a silver tea-service in England, valued at 13*l.* 2*s.* He was also entitled under the will of his uncle, John Orr Ewing (who died in April, 1878), to one-sixth part of 60,000*l.*, and one-sixth also of the residue of John Orr Ewing's estate.

John Orr Ewing by his will gave certain annuities which took precedence of the legacy of 60,000*l.*, and there were also other legacies amounting to 14,500*l.* to be provided for before the residue could be divided. The estate of John Orr Ewing amounted altogether to about 400,000*l.*, being his share of a partnership in the firm of John Ewing & Co., carrying on business at Glasgow, which share was to be paid by ten annual instalments. The will of John Orr Ewing was proved in Scotland by the executors, and a Scotch confirmation produced and sealed with the seal of this Court.

The will of William Ewing was proved in Scotland only, whereupon Mr. Hope instituted proceedings in the Court of Chancery to obtain payment of his legacy, and having failed issued a citation from this Court to the executors of William Ewing's will to accept or refuse probate, and to James Ewing, his father, to accept or refuse letters of administration de bonis non of the estate, or to shew cause why the same should not be granted to him (Mr. Hope) as a legatee.

Mrs. Jane Ewing also made a similar application, on her own behalf, in chambers.

The executors of William Ewing's will, together with Mr. James Ewing, the father, opposed the application, and filed affidavits stating the particulars with regard to the property of John Orr Ewing, and that there were ample funds to satisfy the legacy of 60,000*l.*, and that the deceased William Ewing's share of the estate would amount to more than 50,000*l.*, which would be duly paid, but that at present the amount in the hands of John Orr Ewing's executors was about 1050*l.* only. They also contended that the estate was being properly administered, that there was no property in this country upon which a grant could operate, and that it would therefore cause the estate unnecessary expense.

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IN THE GOODS OF EWING.

Inderwick, Q.C., and *Bayford*, for Mr. Hope, in support of the motion for the grant.

Dr. Deane, Q.C., and *Dr. Tristram*, contrà.

Searle, for Mrs. Jane Ewing.

Cur. adv. vult.

Jan. 25. THE PRESIDENT. This is a proceeding by citation issued by George Wellesley Hope, a legatee named in the will of William Ewing, deceased, against Archibald Orr Ewing and William Ewing, to accept or refuse probate of the said will as executors named therein, and against James Ewing, to accept or refuse letters of administration (with the will annexed) as the natural and lawful father of the deceased, or, that they should shew cause why administration, with the will annexed, should not be granted to G. W. Hope as legatee.

The parties cited have appeared, but shew for cause against administration being granted to the applicant that they are not bound to accept or refuse probate or administration, inasmuch as the executors have already proved the will in Scotland where alone there were any assets.

The deceased, W. Ewing, died in India on the 26th day of December, 1878, having, by his will, dated the 23rd of December, made the following bequests:—

To Sarah Jane Ewing (his stepmother), "30,000*l.*, to be realised and paid out of my share in the will of my late uncle, John Orr Ewing, who died last year."

"And out of the said share in the said will I also bequeath 10,000*l.* to my friend George Hope."

"The remainder of my share from the said will to be divided equally amongst my brothers."

The said will contained no disposition of the general residue, to which therefore the father of the deceased would be entitled as next of kin.

The personal estate and effects, which it is alleged by the applicant were left by the testator within the jurisdiction of this Court, are thus described.

"1. One-sixth part of a legacy of 60,000*l.*, and one-sixth of the residue of the estate of the late John Orr Ewing, which estate consists of property partly in England and partly in Scotland.

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IN THE GOODS OF EWING.

"2. A library of books.

"3. A silver tea kettle and silver tea set."

The second and third items are valued respectively at 15*l.* 16*s.* and 13*l.* 2*s.*

William Ewing and Archibald Ewing, the persons named in the will of the deceased as executors, are also with four others the executors of the final disposition and settlement of the late John Orr Ewing, and these six persons are now administering the estate of the said John Orr Ewing, deceased, in accordance with the law of Scotland, in Scotland, the country of his domicile.

It is sworn, and not denied, that "the share of the deceased, W. Ewing, in the estate of the said John Orr Ewing cannot at present be realised and paid over to the executors of the will of the said W. Ewing, inasmuch as there are annuities given by the will of the said John Orr Ewing which have to be provided for and take precedence over the said legacy of 60,000*l.*, and after the payment of the said legacy of 60,000*l.* there are legacies to the amount of 14,500*l.*, which under the will of the said J. O. Ewing must be provided for before the residue can be divided. The greater part of the assets of the said J. O. Ewing consists of capital in a firm carrying on business in Glasgow, of which he was a member, and which, according to the articles of partnership, can only be drawn out by instalments spread over several years, and the said executors of J. O. Ewing have now a balance in hand of between 1030*l.* and 1050*l.* in Scotland payable to the estate of the said W. Ewing, but no more."

Upon these facts several questions have been suggested, but I do not think it necessary to express a definite opinion upon all of them. The main ground on which this application has been based is that the claim of the estate of William Ewing on the estate of his uncle John Orr Ewing is an asset of W. Ewing's estate in England, by reason of some of the assets of the uncle's estate having been in England at the time of the death of W. Ewing, and therefore that the executors of W. Ewing's will ought to take probate in respect of these assets here.

It is not disputed that the deceased, J. O. Ewing, was a domiciled Scotchman, and that his will was properly proved in Scotland, and is being administered there in accordance with

Scotch law. The claim of the executors of W. Ewing in respect of the interest of their testator under his uncle's will, is a claim on the executors of the uncle duly to administer his estate and to pay the legacy to W. Ewing out of the funds which may be applicable to that purpose. It cannot be disputed that this claim or interest in the estate of the uncle constitutes an asset of the estate of the deceased W. Ewing, because it is recoverable by the executors of W. Ewing virtute officii, but it appears to me that it is an asset in Scotland and not in England: *Executors of Perry* v. *The Queen* (1); *Forbes* v. *Steven.* (2)

The executors of J. O. Ewing have availed themselves of the provisions of 21 & 22 Vict. c. 56, which enables the executors of a person who dies domiciled in Scotland to include in the inventory of his effects all his property wherever situate within the United Kingdom, and they have paid or become liable to pay in Scotland probate duty on the property of the testator situate in England, and the Scotch confirmation has been duly produced in the principal registry here and has been sealed with the seal of this Court, so that it now has the like effect as if probate had been granted here, but the place where the business of administering and winding up the estate of J. O. Ewing is being carried on is Scotland, and any acts done in England by the executors of J. O. Ewing are only ancillary to the administration which is taking place in Scotland.

I am not aware that the point has been the subject of judicial determination, but all analogies seem to lead to the conclusion that Scotland is the local situation of this asset of W. Ewing. Thus the share of a deceased partner in a partnership asset is situate where the business is carried on: Hanson on Probate Acts, &c., p. 161, and shares in a company are locally situate where the head office is: *Attorney General* v. *Higgins.* (3) And the fact that some of the assets of J. O. Ewing were situate in England does not appear to make any difference. If I were to constitute the applicant administrator with the will annexed of W. Ewing he could not in that character take possession of or recover the outstanding assets of the uncle's estate, he could not

(1) Law Rep. 4 Ex. 27. (2) Law Rep. 10 Eq. 178.
(3) 2 H. & N. 339.

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claim those assets themselves virtute officii, his only remedy would still be through and by means of his claim upon the executors of the uncle to have his estate duly administered. It is indeed possible that a Court exercising equity jurisdiction here could interfere, at the instance of the representative of W. Ewing's estate, to prevent the assets of J. O. Ewing's estate in England being wasted or applied in a manner inconsistent with the rights of persons in this country interested in W. Ewing's estate: *Pardo* v. *Bingham*. (1) But this is on the supposition that the executors of J. O. Ewing have done or are about to do something inconsistent with their duty to the estate of W. Ewing. No suggestion of this kind is made in the affidavits on which this application is founded, and I have therefore nothing before me to shew that there is anything which makes it the duty of the executors of W. Ewing to take any proceedings against the executors of J. O. Ewing in England, and so no necessity appears for substituting any one in the place of the executors of W. Ewing to discharge a duty neglected by them.

If the applicant should be advised that any such necessity can be established, the facts relied on must be shewn by affidavit; but I must add that if, as is alleged, the English assets of J. O. Ewing have in the course of administering his estate been removed to Scotland, I doubt whether a Court of Equity would now interfere with their being dealt with in accordance with Scotch law.

But it was further contended that the legacy to Mr. Hope is a demonstrative legacy, and that he therefore has a claim on the general estate of the deceased W. Ewing, and that some of the assets of that estate, namely the books and plate, were in England at the time of W. Ewing's death.

It is not necessary for me to determine whether this legacy is demonstrative; because, assuming that it is, I do not consider that in the existing state of facts I ought to grant the administration asked for to the applicant.

This is not, as now presented to the Court, a matter of legal right. It is an application to the discretionary power of the Court on the non-contentious side of its jurisdiction. The Court is not bound to grant administration to a legatee as it is to the

(1) Law Rep. 6 Eq. 485.

next of kin, whose rights are derived from statute: *Rex* v. *Bettesworth.* (1) And in those cases which are not within the statute of administration the Court is left to the exercise of its discretion in the choice of an administrator, and no person has such a legal right to preference as can be enforced at law: Williams on Executors, 444, p. 472, pt. i., bk. v., ch. iii., § 1, 8th ed.

What case is then made out for the exercise of the discretion of the Court in favour of the applicant? It cannot be supposed that these proceedings are really taken to enable the applicant, in the apparently improbable event of W. Ewing's estate proving insufficient to pay the legacy of 10,000*l.*, to have recourse to the assets of W. Ewing in England valued at 28*l.* 18*s.*

There is nothing to contradict the statement of the executors of W. Ewing that there are, or will be, ample assets in Scotland of J. O. Ewing's estate to pay the legacy to the nephew, with which to satisfy the bequests of his will.

This being so, it does not appear to me to be the duty of the executors of W. Ewing to take any proceedings to recover from James Ewing, the father of W. Ewing, the books and plate which were in his possession at the time of his son's death, and to which he is entitled as next of kin, unless the share of the estate of the uncle should prove insufficient to meet the legacies left by W. Ewing. Should the time arrive when it shall appear that recourse is necessary in England to the 28*l.* worth of books and plate to make up the applicant's legacy, I shall be willing to consider whether and to whom, in the exercise of my discretion, I should grant administration with respect to those articles. The administration would in that case be limited to the property not disposed of by the will. In the meantime the applicant is not precluded from taking proceedings for the recovery of his legacy in Scotland, where the executors of W. Ewing will be liable as for a devastavit if they neglect at the proper time to collect any assets legally applicable to the payment of legacies.

One or two other points were adverted to at the hearing, but not argued. One was as to the domicile of W. Ewing at the time of his decease. It is unnecessary to pursue this inquiry,

(1) 2 Str. 956.

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as I hold that W. Ewing had substantial assets in Scotland in respect of which it was proper and necessary that probate should be taken in that country.

Another point adverted to was that either the executors of W. Ewing, or James Ewing his father, may be liable to penalties for dealing with the books and plate without proving the will or taking administration here. But this is not the question I have to determine. It is for the revenue authorities to judge whether this is a proper case in which to take proceedings for such penalties.

On the whole I feel bound to reject the application, on the ground that no necessity or duty towards the applicant or the estate of the deceased at present appears for the executors to take probate in England, and that until such necessity or duty arises I am not called upon to decide, in default of their doing so, to whom administration should be granted.

A similar application was made in chambers on behalf of Mrs. Sarah Jane Ewing, with this additional circumstance, that it was stated that a representative of the estate of W. Ewing was necessary for the purposes of a suit now pending before the Master of the Rolls between Mrs. Ewing and her husband James Ewing.

The executors of W. Ewing deny that it is necessary for the purposes of the said suit that probate of his will should be obtained in England. In this state of things I thought it expedient to inquire of the Master of the Rolls whether the suit was properly constituted without the executors of W. Ewing being made parties in their representative capacity, and he informs me that he considers that it is.

I therefore refuse Mrs. Ewing's application, as well as that of Mr. Hope.

Solicitors for Mr. Hope: *Stibbard, Gibson, & Co.*
Solicitors for parties interested: *Johnson, Upton, & Co.*
Solicitors for Mrs. Ewing: *Lattey & Hart.*

WILKINSON *v.* CORFIELD. 1881 Jan. 26.

Codicil proved by Legatee—Costs as of Executor proving.

A legatee who has propounded a codicil and succeeded is entitled to the same costs as an executor under similar circumstances.

The defendant, the executor of the will of R. C., had proved the will only. The plaintiffs propounded a codicil. The Court having pronounced for the codicil, condemned the defendant in costs, and gave the plaintiffs also out of the estate such sum nomine expensarum as would cover the additional expenses.

Richard Corfield, late of Bradney, in Worfield, in the county of Salop, farmer, deceased, died on the 1st of May, 1879, having made a will dated the 22nd of November, 1873, and a codicil dated the 27th of April, 1879.

By the will the testator gave all his property to his brother, the defendant, Thomas Corfield, and his sister Eliza Corfield absolutely, subject to an annuity of 15*l.*, and appointed them executor and executrix. By the codicil the testator gave the plaintiff, Mary Wilkinson, wife of the other plaintiff, an annuity of 20*l.* charged upon his property generally. The testator's sister died in his lifetime, and the defendant proved the will only. The plaintiffs thereupon propounded the codicil, to which the defendant pleaded that it was not duly executed, that the deceased did not know and approve of the contents thereof, and that it was revoked by the deceased by having been torn by him and the pieces burnt by the defendant by the direction of the deceased. At the hearing, before the Court alone, it was proved that the codicil was duly executed by the testator, who thoroughly approved of it, and that it was given by him to one of the attesting witnesses, who subsequently sent it back to the defendant. The defendant alleged that on the 30th of April he gave the codicil to the testator who tore it into three pieces, and told him to put them on the fire, which he accordingly did. The Court nevertheless found that the codicil had not been revoked, and condemned the defendant in costs.

Jan. 12. *Inderwick, Q.C.* (*Bayford*, with him), applied for an order that the plaintiff's extra costs should be paid out of the estate.

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A. Staveley Hill, Q.C., and *Searle*, were for the defendant.

Cur. adv. vult.

Jan. 26. THE PRESIDENT. In this case a legatee having propounded a codicil made in her favour and succeeded, an application was made to me for her costs upon the ground that in propounding the codicil she ought to be allowed those costs, which, if the executor had done his duty, he would have been able to take for himself out of the estate, and I am of opinion that that is a reasonable application. That a legatee is entitled to have his expenses paid when he establishes a testamentary paper is laid down in *Sutton* v. *Drax* (1) in these terms: "Where a legatee propounds a paper and establishes it, thereby fulfilling the duty of the executor, the legatee is entitled to have his expenses paid out of the estate of the deceased. This is the rule of the Court." If in this case I gave no more than the ordinary costs, the legatee would have no benefit for a considerable time from her small annuity of 20*l.*, and I therefore think I ought to allow her costs on the same scale practically as the executor would himself have been entitled to have received. I shall therefore make the order in the form which I find has been used in the analogous case of *Bremer* v. *Freeman and Bremer* (2), in which a sum was allowed nomine expensarum.

The order I shall make will be in these terms: "I further give to the plaintiff nomine expensarum such sum as shall be considered by the registrar sufficient to cover the additional expenses of the plaintiff of and incidental to these proceedings, to be paid out of the estate of the deceased."

Solicitors for plaintiff: *Prior & Co.*
Solicitors for defendant: *Truefitt & Gane.*

(1) 2 Phillim. 323.

(2) Dea. & Sw. 258.

TAYLOR *v.* TAYLOR. 1881 *Feb.* 8.

Administrator pending Suit—Receiver pending Suit—Termination—Costs.

The duties of an administrator and receiver pending suit commence from the date of the order of appointment, and if the decree in the action is appealed from, do not cease until the appeal has been disposed of.

Costs of the administrator and receiver pending suit and of his solicitor allowed from the date of the appointment until the dismissal of the appeal.

THIS was a summons in objection to a taxation of costs.

The plaintiffs, as executors, propounded the will of Henry Taylor, deceased, which was opposed by the defendant, the daughter and heiress-at-law.

The following are the material dates:—

1878. Dec. 24th. Action commenced.
1879. Feb. 25th. Order appointing Mr. Ward administrator and receiver pending suit.
„ March 21st. Order for receiver pending suit sealed.
„ April 5th. Letters of administration pending suit issued.
„ May 3rd and 6th. Action heard. Verdict, and sentence pronouncing against the will and condemning the plaintiff in costs.
„ May 21st. Rule nisi for new trial.
„ July 1st. Rule discharged.
1880. March 9th. Order authorizing Mr. Ward as administrator and receiver pending suit to sell farming stock, &c.
„ March 23rd. Similar order authorizing him to give a tenant notice to quit.
„ April 20th and 23rd. Appeal from order discharging the rule nisi heard and appeal dismissed.
„ May 10th. Letters of administration granted to the widow of the deceased.

On the taxation the registrar disallowed all the costs of Mr. Ward and his solicitor between the 25th of February, 1879, and the dates when the letters of administration issued, and the order

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for receiver was sealed, on the ground that Mr. Ward had no power to act till then.

The registrar also disallowed Mr. Ward's and his solicitor's costs from the 6th of May, 1879, on the ground that the final decree was made on that day, and that the defendant might at once have taken out a grant of letters of administration, notwithstanding the appeal, or might have obtained fresh appointments as administrator and receiver pending suit: *Charlton* v. *Hindmarsh.* (1)

Bayford, in objection to the taxation. *Fisher* v. *Joy* (2); *Wells* v. *Wells and Hudson* (3); *Jones* v. *Jones.* (4)

Jeune, in support of the taxation.

THE PRESIDENT considered that the appeal operated as an extension of the suit, and also that the plaintiffs, by their conduct in the case, and especially by being parties to the orders of the 9th and 23rd of March, 1880, were estopped from objecting. He, therefore, allowed all the costs from the date of the order appointing the administrator and receiver.

Solicitors for plaintiffs: *White & Sons.*
Solicitors for defendant: *Chorley, Crawford, & Chester.*

Feb. 15.

IN THE GOODS OF S. M. HEATHCOTE.

Will—Incorporation.

S. M. H., while a married woman made a will which was invalid. Afterwards when a widow, she executed a document beginning with the words "this is a codicil to the last will and testament of me." The codicil was written on the same paper as the will and immediately after it, and it was proved that she had made no other will:—

Held, that the will was incorporated in the codicil. Probate granted of both documents.

SOPHIA MATILDA HEATHCOTE, late of North Luffenham Hall, in the county of Rutland, widow, died on the 20th of November, 1880.

The deceased had under her marriage settlement an absolute

(1) 1 S. & T. 519.
(2) 4 P. & D. 231.
(3) 3 S. & T. 542.
(4) 2 P. & D. 333.

power in the event of her husband surviving her of disposing by will of their settled property, and on the 17th of November, 1874, she made, in the lifetime of her husband, a will bequeathing that property. She survived her husband, and therefore the power never took effect, and the will was invalid. On the 1st of November, 1880, she, being then a widow, made a codicil to the will. This as well as the will was in her own handwriting, and was written upon the same piece of paper as the will immediately after it. It began with the words "this is a codicil to the last will and testament of me, etc.," but contained no other reference to the will. It was, however, agreed by all parties that no later will than the will of the 17th of November, 1874, had been made by the deceased, and that an affidavit to that effect could be supplied.

Inderwick, Q.C., and *Searle*, moved for probate of both documents. Though the will by itself was inoperative in the events which have happened: *Price* v. *Parker* (1); *Noble* v. *Willock* (2), the codicil with the surrounding circumstances sufficiently identify the will, so as to incorporate it: *Allen* v. *Maddock* (3); *In the Goods of Smith.* (4)

Bayford, for other parties interested, supported the application.

Dr. Tristram, and *Pritchard*, contrà, for parties whose interests would be prejudiced by probate of both documents. The will must be identified as then existing by the codicil, and the surrounding circumstances only: *In the Goods of Sunderland.* (5) Evidence of intention is not admissible: *In the Goods of Almosnino.* (6) The fact that the codicil is on the same paper is not of itself sufficient to incorporate it: *In the Goods of John Brewis* (7); *In the Goods of Watkins.* (8) Nor are the words "this is a codicil, &c." sufficient: *In the Goods of Stockil and Others* v. *Punshon.* (9)

THE PRESIDENT. The only question raised for my determination is whether I am satisfied that the will of 1874 is sufficiently

(1) 16 Simon, 198.
(2) Law Rep. 7 H. L. C. 580.
(3) 11 Moo. P. C. 427.
(4) 2 Curt. 796.
(5) Law Rep. 1 P. & D. 198.
(6) 1 Sw. & Tr. 510.
(7) 3 Sw. & Tr. 473.
(8) Law Rep. 1 P. & D. 19.
(9) 6 P. D. 9.

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identified as the last will and testament which is referred to in the codicil.

The case is governed by the passage in *Allen* v. *Maddock* (1), and on the present occasion the Court of Probate is to a certain extent a court of construction; for it has to determine what is the meaning of the reference made by the testatrix in her codicil to her last will and testament, and whether any, and if any, what instrument found at her death is thereby referred to.

This question is one of fact, and can only be explained by parol evidence, which must necessarily be received to prove whether there is or is not in existence at the testatrix's death any such instrument as is referred to by the codicil. For this purpose, it must be shewn what papers there were at the date of the codicil which could answer the description contained in that document, and the Court having by these means placed itself in the situation of the testatrix, and acquired as far as possible all the knowledge which she possessed, must say, upon a consideration of those extrinsic circumstances whether the paper is identified or not.

In the case of *Stockil and Others* v. *Punshon and Others* (2) it was of no importance which way the Court decided. I therefore did not consider the question of what extraneous evidence would be sufficient to connect the one document with the other, but I acted on the impression that the bare fact of enumeration was not sufficient to incorporate the second paper. But in this case it is to be taken by admission that there is no other known instrument to which this reference made in the codicil could apply, and it is upon that assumption that I decide that this will so referred to in the codicil must be admitted to probate.

An affidavit of the character mentioned by Mr. Inderwick must, however, be supplied.

Solicitor for executors: *M. Jameson.*

Solicitors for the other persons interested: *Cree & Son; M. Jameson.*

(1) 11 Moo. P. C. 426, at p. 441.

(2) 6 P. D. 9.

BANFIELD *v.* PICKARD.

1881
March 8.

Practice.

Under s. 26 of 20 & 21 Vict. c. 77, the Court has power to order a commission to issue to examine a person as to her knowledge of a testamentary paper.

THIS was an application for an order to examine the defendant, Mrs. Pickard, under s. 26 of the Probate Act, 1857, on an affidavit she had filed in answer to a subpœna calling upon her to file in the registry a codicil made by the deceased to his will. Mrs. Pickard was ill, and was unable to be examined in open Court.

Dr. Tristram moved for an order under s. 26 of 20 & 21 Vict. c. 77, for the examination of the defendant before a commissioner appointed by the Court. The words of the section give the Court this power. (1)

Callaghan, for the defendant. Even if the Court has the power the plaintiff has not shewn by his affidavit sufficient grounds for the making of an order for the defendant's examination.

THE PRESIDENT. The words of the section are, I think, sufficient to enable the Court to order the defendant to attend to be examined vivâ voce before a commissioner, as she is unable to attend in open Court.

Order accordingly.

Solicitor for plaintiff: *R. Watson.*

Solicitors for defendant: *Boulton, Sons, & Sandeman.*

(1) 20 & 21 Vict. c. 77, s. 26: "If it be not shewn that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court, or upon interrogatories respecting the same. . . ."

1881
March 1.

IN THE GOODS OF SARAH ANN COOPER, Deceased.

Will of Married Woman—Husband's Assent to Probate.

A will was made by a married woman who appointed her husband one of the executors. He assented to the making of the will, and after her death expressed his intention to take probate, but died before doing so :—

Held, that he had assented to the probate.

Sarah Ann Cooper, who died on the 19th of September, 1880, made her will, bearing date the 23rd of August of that year. The will was made with her husband's consent, and appointed him and her brother executors. Immediately after the execution of the will the husband signed the following memorandum :—

"I, James Cooper, of Hagley, in the county of Worcester, builder, hereby acknowledge that the sums of 400*l.* and 200*l.*, now in the possession of Mr. L. D. Broughton, are the separate estate of my wife, Sarah Ann Cooper, to will and dispose of as she may think proper."

The will disposed of these sums. After the death of the testatrix the husband expressed, on several occasions, to his co-executor his wish to prove the will, but was too ill to do so. He never recovered from his illness, and died before the will was proved.

Feb. 22. *Pritchard*, for the surviving executor, moved the Court for probate. The husband's consent is to be implied from the circumstances : *Brook* v. *Turner* (1) ; and consent once given cannot be withdrawn : *Maas* v. *Sheffield*. (2) Where the husband has consented to the making of the will slight proof will be sufficient to make out the continuance of the husband's consent after death : Fraser's note to *Forse & Hembling's Case*. (3)

Cur. adv. vult.

March 1. The President. In this case the testatrix, a married woman, died in September, 1880, having made her will on the 23rd of August in the same year. The will was made with the consent

(1) 2 Mod. 172.

(2) 1 Rob. 364 ; 4 Notes of Cases, 350.

(3) 4 Co. Litt. 61 b.

of her husband, and he signed a memorandum to that effect. After her death it was intended that the will should be proved by her husband and the other executor appointed by it; but this could not be done in consequence of the husband's illness, and down to his death he never in any way withdrew his consent. In these circumstances, I think the will is entitled to probate.

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IN THE GOODS OF COOPER.

Order accordingly.

Solicitors: *Kennedy, Hughes, & Kennedy.*

[IN THE COURT OF APPEAL.]

1880
Dec. 20.

HARVEY, OTHERWISE FARNIE *v.* FARNIE.

Marriage in England between domiciled Scotchman and Englishwoman—Divorce in Scotland by reason of Husband's Adultery only—Validity.

The English Divorce Court will recognize as valid the decree of a Scotch Court dissolving the marriage of a domiciled Scotchman and an Englishwoman, although the marriage was solemnised in England, and the marriage was dissolved upon a ground for which by English law no divorce could have been granted.

The question of divorce is not an incident of the marriage contract to be governed by the lex loci contractus, but is an incident of status to be disposed of by the law of the domicil of the parties—that is, of the husband's.

Lolley's Case (Russ. & Ry. 237; 2 Cl. & F. 567) distinguished.

M'Carthy v. *De Caix* (2 Russ. & My. 614; 2 Cl. & F. 568) examined and explained.

Affirmed by H. of L. 8 App. Cas. 43 [illegible]

APPEAL from an order of the President of the Probate Division, dismissing a petition for declaration of nullity of marriage. (1)

The respondent Henry Brougham Farnie, a domiciled Scotchman, married on the 13th of August, 1861, in England, an Englishwoman. After the marriage they went to Scotland and resided there until 1863, when the wife obtained a decree from a Scotch Court for dissolution of the marriage by reason of her husband's adultery only. On the 31st of May, his former wife being still alive, he married the petitioner at All Souls Church, Marylebone.

The president dismissed the petition.

The petitioner appealed.

(1) 5 P. D. 153.

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HARVEY v. FARNIE.

Dec. 14. *Fooks, Q.C., Benjamin, Q.C.* (with them, *Horace Davey, Q.C.*, and *W. Fooks*), for the appellant. The points relied on by the appellant are, 1, that a marriage solemnized in England between an English subject of the Queen, domiciled in England, and a Scotch subject domiciled in Scotland is an "English marriage"; 2, that the Scotch Courts have no jurisdiction to pronounce a decree of divorce between the parties to such a marriage, even when both are domiciled in Scotland, on grounds which by English law are insufficient to justify such a decree; 3, that such decree, even if valid within the territorial jurisdiction of the Scotch Courts, has no extra-territorial effect, and is invalid in England as contrary to the policy which governs the matrimonial and family relations here; 4, that as an almost universal rule, status, so far as relates to the marriage contract, is governed, not by the law of the domicil, but of the place where the marriage is contracted.

The marriage here was an "English marriage," that is a "marriage solemnised in England" according to the forms and ceremonies required by the English law to make it a valid and binding marriage. The expressions are convertible terms: see *M'Carthy* v. *De Caix* (1), where Lord Brougham so translates the expression "English marriage" used by the judges in *Lolley's Case* (2), and *Tovey* v. *Lindsay*. (3) And the fact that the husband was a domiciled Scotchman makes no difference: *Shaw* v. *Gould* (4), where Lord Colonsay calls the marriage in *Warrender* v. *Warrender* (5), i.e., a marriage between a domiciled Scotchman and an English lady, an "English marriage," and see also the observations of Lord Westbury at pp. 86, 87 of the same case.

This, then, being an English marriage, *Lolley's Case* (2) supports the second proposition, whether the resolution in that case be taken in its wider or more restricted form, that is, whether it be taken as holding that no foreign court can dissolve an English marriage, or that no foreign court can dissolve an English

(1) 2 Russ. & My. 614. The record in this case was brought into court, and on examination of such record the judges were of opinion that the question of divorce was not really raised. See, too, the observations of Lord St. Leonards in *Geils* v. *Geils*, 1 Macq. 255.

(2) Russ. & Ry. 237; 2 Cl. & F. 567.

(3) 1 Dow. 117, 124.

(4) Law Rep. 3 H. L. 55, 94.

(5) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.

marriage except for causes which by the English law would justify such a decree. *Lolley's Case* (1), though often attacked and disparaged, especially by Lord Brougham, is still law, and has been recognised as binding in *M'Carthy* v. *De Caix* (2); *Dolphin* v. *Robins* (3); *Tovey* v. *Lindsay* (4); *Shaw* v. *Attorney General.* (5)

M'Carthy v. *De Caix* (2) is a direct authority in favour of the appellant. A Dane came over to England and married an English lady here, returned to Denmark, retaining his Danish domicil, and finally obtained a divorce there. Lord Brougham there held, upon the authority of *Lolley's Case* (1), that the divorce, though valid as far as the court of Denmark could make it, had by the English law no effect whatever. It is endeavoured to get rid of that case as an authority by some observations of Lord St. Leonards in *Geils* v. *Geils* (6), in which he says that the effect of the divorce was not argued in that case; but it appears from the judgment of Lord Brougham in that case that there had been an elaborate argument with reference to *Lolley's Case* (1) before his predecessor Lord Eldon, all of whose notes were before Lord Brougham. No doubt the point was not argued before Lord Brougham, but that was because he did not require argument, as he was satisfied as to the application of *Lolley's Case.* (1) And he says there was a valid decree of divorce, and his judgment in the case must be taken as based upon that assumption, and is an equally authoritative exposition of the law, even though the actual point may not necessarily have arisen for decision. The resolution in *Lolley's Case* (1), as representing the unanimous opinion of the twelve judges who were summoned to advise upon the question, must be treated in the same way as the reports in Lord Coke's time—that is, as laying down the general rule of law upon the subject before them of universal application, not controlled by the particular circumstances of the case.

The result then in support of the third proposition is, that although a Court may have jurisdiction to carry out the laws of the country which govern the matrimonial relations, it cannot pronounce a decree according to its own laws dissolving an

(1) Russ. & Ry. 237; 2 Cl. & F. 567.
(2) 2 Russ. & My. 614.
(3) 7 H. L. C. 390.
(4) 1 Dow. 117, 124.
(5) Law Rep. 2 P. & D. 156.
(6) 1 Macq. 255.

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English marriage between English subjects, but as it must be admitted that the wife acquires the domicil of her husband, it is subject to this modification, that if the courts of the domicil decree a divorce upon grounds which the English Courts would recognise as justifying divorce, then that divorce would be good here. So if here the wife had obtained a divorce on the grounds of her husband's adultery, coupled with cruelty, both parties being domiciled in Scotland, the Scotch Court would, in decreeing a divorce, have been enforcing the law of England, that is the lex loci contractus, and the English Courts, by a like comity, have held marriages void which, by reason of the law of the domicil of both the parties, were incestuous, although not so here: *Brook* v. *Brook* (1); *Sottomayor* v. *De Barros.* (2) *Warrender* v. *Warrender* (3) is not against the appellant. The decision there only went to this, that a dissolution, by a decree of divorce by a Scotch Court of a marriage between a domiciled Scotchman and an English lady, was of binding effect in Scotland, that is that the Scotch Courts had a territorial jurisdiction, which is not disputed. The Lords, in giving their opinions, seem to have carefully so limited the decision. They say that they were sitting as a Scotch Court of Appeal upon a Scotch question. That case was followed by *Geils* v. *Geils* (4), which is similar, the Court holding that the marriage being a "Scotch marriage," the Courts of Scotland had jurisdiction in Scotland for Scotch purposes, but what the effect would be in England was another question left undecided. The case of *Maghee* v. *M'Allister* (5), on which the president relied, will be cited against the appellant. But it is worth noticing that that case, which was decided in 1853, was not referred to in any of the subsequent cases of *Dolphin* v. *Robins* (6), *Pitt* v. *Pitt* (7), or *Shaw* v. *Gould* (8) in the House of Lords, or in the case of *Shaw* v. *Attorney General.* (9) It depends on *Warrender* v. *Warrender* (3) and *Geils* v. *Geils* (4), and proceeds on a mistake, for the Lord Chancellor Blackburne says that he was bound by the observations of Lord Lyndhurst and Lord Brougham in those

(1) 7 H. L. C. 390.
(2) 3 P. D. 1.
(3) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.
(4) 1 Macq. 255.
(5) 3 Ir. Ch. 604.
(6) 3 H. L. C. 590.
(7) 4 Macq. 657.
(8) Law Rep. 3 H. L. 55.
(9) Law Rep. 2 P. & D. 156.

cases, and by the judgment of Dr. Lushington in *Conway* v. *Beazley* (1) and the case of *Munro* v. *Munro* (2), to treat the marriage there, i.e., between a domiciled Scotchman and an Irishwoman, as a Scotch marriage. But the cases do not warrant that conclusion. *Munro* v. *Munro* (2) only decides that by the law of Scotland the subsequent marriage of parents legitimises their offspring born before marriage, and that such marriage, although it takes place in England, whose law does not recognise subsequent legitimation, has the effect of legitimising children for the purpose of inheriting Scotch entailed estates, and Lord Cottenham (3) gives his view of *Warrender* v. *Warrender* (4) that for civil purposes in Scotland a marriage in England of a domiciled Scotchman was to be considered a Scotch marriage. So in *Birtwhistle* v. *Vardill* (5) legitimation in Scotland by a subsequent marriage did not entitle the heir to estates in England.

[COTTON, L.J. That case turned on the Statute of Merton, under which the heir to land in England must be born in wedlock.]

The question is one of status. The law of England, where the marriage was contracted, established the status of the parties. The law of England establishes the status of an Englishwoman who marries in England, whether a foreigner or not; that is, the status of a wife—a status not dissoluble except for special reasons. That status is fixed by the lex loci contractus: the wife here, though she acquired a Scotch domicil after the marriage, had an English one when she contracted the marriage, and must be taken to have contracted the marriage on the faith of its being governed by the law of England. The foreigner who comes to England and marries under its laws an English wife, assents as far as he can to her status being that of an English wife, and while he is here the status of the wife is fixed. That status cannot be changed to the prejudice of the policy of English law, and the husband cannot, by taking her away, choose a domicil for her which would enable him to alter that status: see observations of Lord Redesdale in *Tovey* v. *Lindsay* (6) and of James, L.J., in *Niboyet*

(1) 3 Hagg. Eccl. 639.
(2) 7 Cl. & F. 842.
(3) 7 Cl. & F. 842, at p. 875.
(4) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.
(5) 2 Cl. & F. 571; 7 Cl. & F. 875.
(6) 1 Dow. 117, at p. 139.

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v. *Niboyet* (1); Story on Conflict of Laws, s. 88. So, too, in *Shaw* v. *Gould* (2) Lord Cranworth says that English Courts are not bound by the comity of nations to hold that the Scotch law changed the status of the English wife, that change being to the prejudice of English policy; and see also the observations of Lord Westbury on that case (3) and Huber (4).

[LUSH, L.J., referred to the Naturalisation Act, 1870.]

That is an enactment governing the relations between different governments, and was passed exclusively for political purposes. It was a special Act, relating not to the domicil of a wife but to her nationality, and provides that an Englishwoman marrying a foreigner or becoming naturalised loses her British nationality, and is no longer bound to the sovereign of this country. It is to meet the old saying, "Nemo potest exuere patriam." If the woman was to go to Scotland to be married there, then she would be submitting to the Scotch law, and if the Scotchman comes to England his marriage is under the English law. See Rodenburgh. (5) In *Niboyet* v. *Niboyet* (1) it was held that domicil was not to be taken as the test of jurisdiction. It cannot be that the relations between husband and wife are to be subject to foreign jurisdiction, and to be at the mercy of the husband. This, as James, L.J. said in *Niboyet* v. *Niboyet* (6) would be "a violation of every principle to make the dissolubility of a marriage depend on the mere will and pleasure of the husband, and domicil is entirely a matter of his will and pleasure." If the law of the domicil is to regulate the question, it must also apply to the case of a Turk, or the subject of some country which recognises polygamy, coming over here and contracting marriage. For these reasons, domicil cannot settle the question. Where a foreigner comes here and contracts a marriage which is indissoluble except for certain specific causes,

(1) 4 P. D. 1.

(2) Law Rep. 3 H. L. 55, at p. 82.

(3) Law Rep. 3 H. L. 55, at p. 81.

(4) De Confl. Leg. bk. i. tit. 3, s. 2: "Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur."

(5) "De jure quod oritur ex diversitate statutorum." It is appended to Boullenois de la Personnalité, last section of book.

(6) 4 P. D. 1, at p. 8.

how can the courts of England recognise a foreign decision dissolving the marriage, if, assuming the action to have been brought before the English court, that Court would have refused to grant relief? The second marriage is therefore null and void, and the appellant is entitled to have it so declared.

Dec. 17. *Dr. Deane, Q.C.*, and *Winch*, for the respondent. The cases which have been cited resolve themselves into two classes—one extensive, commencing with *Lolley's Case* (1), the other a small class, commencing with *Warrender* v. *Warrender*. (2) The former class is one in which parties really domiciled in England, and married in England, go to Scotland for the express purpose of evading the law of England, and by means of a temporary and fictitious domicil in Scotland obtaining a benefit which the law of England would not give them. The domicil in *Lolley's Case* (1) was fictitious, as was pointed out by Lord Brougham in *Warrender* v. *Warrender* (3) and by Dr. Lushington in *Conway* v. *Beasley* (4), and so it was in the cases of *Shaw* v. *Attorney-General* (5); *Dolphin* v. *Robins* (6); and *Pitt* v. *Pitt*. (7)

This case is really disposed of by the other class of cases, viz. *Warrender* v. *Warrender* (2) and *Geils* v. *Geils*. (8) No doubt both came on appeal from Scotland, but the decisions are good on general principles, and if the lex loci contractus is but an incident, and all the rights, duties, and obligations flowing from the contract are to be governed by the law of the bonâ fide domicil, then these cases will apply to the present. The domicil here of the husband was clearly Scotch, and that being so, the wife's domicil became Scotch, and the marriage here was, in the words of Lord Brougham in *Warrender* v. *Warrender* (2), "a marriage had in England between a Scotchman and an Englishwoman, the residence or domicil of the husband being bonâ fide Scotch," and, as he further remarks, the determination upon the question of domicil makes the forum originis of the wife quite immaterial. This displaces a great part of the arguments as to the lady being originally an Englishwoman, and the judge in that case shews

(1) Russ. & Ry. 237; 2 Cl. & F. 567.
(2) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.
(3) 2 Cl. & F. 481, at p. 541; 9 Bl. (N.S.) 89.
(4) 3 Hagg. Eccl. 639.
(5) Law Rep. 2 P. & D. 156.
(6) 7 H. L. C. 390.
(7) 4 Macq. 657.
(8) 1 Macq. 255.

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that by the marriage with a bonâ fide domiciled Scotchman, the woman becomes a Scotch wife, and therefore subject to Scotch law. The case of *Munro* v. *Munro* (1) shews too that the question of domicil is the real point to be considered, and the reference to domicil really frees the question of all difficulty. That is what distinguishes it from the case of *Rose* v. *Ross* (2), in the latter case the domicil of the husband was English, and Lord Lyndhurst stated as the ground of his opinion that, although the marriage was in Scotland, it was the marriage of persons having an English domicil and coming into Scotland for the purpose of the marriage only, and that being so, the Scotch law did not apply, and the reason why Lord Eldon remitted the case of *Tovey* v. *Lindsay* (3) was that he was of opinion that the husband's domicil was English. Lord Cottenham in *Munro* v. *Munro* (4) says that in *Warrender* v. *Warrender* (5), it was correctly assumed that for civil purposes in Scotland a marriage in England of a domiciled Scotchman was to be considered a Scotch marriage. It has been decided that divorce is a civil proceeding.

The domicil of the husband, not necessarily at the time of the marriage, but at the time of the action, is the ground on which the jurisdiction of the Scotch Court is based. That domicil attracts the wife's domicil, and brings her constructively within the jurisdiction, per Lord Chelmsford in *Shaw* v. *Gould* (6), and the wife having once acquired a Scotch domicil becomes to all intents and purposes subject to and entitled to the benefit of the laws and institutions of Scotland. It is not the law of the country where the contract is entered into, but of that where it is to be enforced that regulates its enforcement: *Don* v. *Lippman* (7), and here the contract was to be enforced in Scotland. Huber, De Confl. Leg. sect. 10; *Robinson* v. *Bland* (8); *Ilderton* v. *Ilderton.* (9) But the case of *Maghee* v. *M'Allister* (10) is on all fours with the present and is conclusive in the respondent's favour, and the observations of Brett, L.J., in *Niboyet* v. *Niboyet* (11) shew that the

(1) 7 Cl. & F. 842.
(2) 4 Wil. & Shaw, 289.
(3) 1 Dow. 117.
(4) 7 Cl. & F. 842, at p. 875.
(5) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.
(6) Law Rep. 3 H. L. 55, at p. 76.
(7) 5 Cl. & F. 1.
(8) 1 W. Bl. 258.
(9) 2 H. Bl. 145.
(10) 3 Ir. Ch. 604.
(11) 4 P. D. 1, at pp. 12, 19.

domicil of the husband at the institution of the suit is the fact which gives jurisdiction to decree the divorce.

[They also referred to *Mettee* v. *Mettee* (1); *Manning* v. *Manning* (2); *Shedden* v. *Patrick* (3); *Mordaunt* v. *Moncreiffe* (4); *Yelverton* v. *Yelverton*. (5)]

Fooks, Q.C., in reply, referred to *Sottomayor* v. *De Barros* (6) and *Simonin* v. *Mallac* (7). as authorities that marriages contracted in this country between persons bonâ fide domiciled in foreign countries had been held subject to the jurisdiction of the courts of this country, and that the lex loci contractus and not lex domicilii was the governing law. He referred also to *Colliss* v. *Hector* (8) and *In re Goodman's Trusts*. (9)

Cur. adv. vult.

Dec. 20. JAMES, L.J. In this case I am myself unable to entertain any doubt whatever as to the correctness of the decision of the learned President of the Probate Division.

The question is whether a decree by a Scotch Court between Scotch parties has the effect of dissolving a marriage which has been contracted between these parties.

It is said that the decree has no operation, and ought not to be recognised in England, because the marriage was solemnised in England, and because in *Lolley's Case* (10) it was held according to one report that an English marriage could not be dissolved by a Scotch Court, or any foreign court, except for reasons for which it would have been capable of being dissolved in England; and according to another report that the words "English marriage" have been construed by somebody, nobody knows when or how, to be a "marriage solemnised in England." Now we know very little of *Lolley's Case* (10), except the facts which the reporter states in Russell and Ryan, and the decision. Of course every judgment of any Court must be construed with reference to the facts that were before the Court for determination. At the time when the judgment in *Lolley's Case* (10) was given by the learned

(1) 1 Sw. & Tr. 416; 28 L. J. (P. M. & A.) 117.
(2) Law Rep. 2 P. & D. 223.
(3) 2 Sw. & Tr. 170.
(4) Law Rep. 2 H. L., Sc. 374.
(5) 1 Sw. & Tr. 574.
(6) 4 P. D. 1.
(7) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97.
(8) Law Rep. 19 Eq. 334.
(9) 14 Ch. D. 619, under appeal.
(10) Russ. & Ry. 237; 2 Cl. & F. 567.

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judges, who were consulted rather than sitting as a tribunal of appeal—whatever may have been the habit of the judges in the time of Lord Coke of laying down abstract general propositions, going far beyond the necessities of the particular case or cases before them—it certainly was not the habit of judges then, any more than it is their habit at this day, to express general propositions or articles of a code, beyond what was required by the particular circumstances of the case.

The particular circumstances of that case were, a marriage between English persons, that is to say, a marriage in England between persons domiciled in England; and an appeal to a Scotch Court by one of those persons as against the other, during a temporary residence in Scotland, it being beyond all question that they were neither of them domiciled in Scotland at the time. And it was held in that case that the decision of a Scotch Court affecting the status of English domiciled persons, domiciled in England at the time when the status was originally constituted, and domiciled in England at the time when the status was sought to be removed, was invalid; that according to English notions of law, the Scotch Court ought not to entertain a suit affecting the status of English people. That clearly was the whole of the decision. That decision has to that extent been admitted to be good law. I do not think it has ever been questioned, nor do I feel myself disposed to say that that case is now capable of being questioned. But the application of that case to the circumstances of the present has certainly been very much questioned, and questioned by the very highest authorities. It is impossible to read the judgment of Dr. Lushington in the case of *Conway* v. *Beasley* (1) without seeing that he did not consider that that case established any such universal rule, that he did not consider it was binding upon him or upon any court in this country beyond the actual facts of that case, that is to say, that it was to be confined to a case where there was a fictitious domicil, as Dr. Deane called it, or a domicil where there was no domicil really attached to it, where there was merely a temporary residence in the country the courts of which were appealed to. But more than that we have the expressions of many learned lords evidently expressing exactly the same view

(1) 3 Hagg. Ecc'. 639.

of that case, that it was only to be considered as applying to the circumstances of that case. And then we have the express authority of the Lord Chancellor of Ireland, Lord Blackburne, in a case exactly applicable to the facts before the Court, the very point being raised, with the sole distinction that you must substitute England for Ireland, and substitute the Irish Court for the English Court, as the place in which the question came to be decided.

Under those circumstances there is no authority, although at first I was pressed with this, that there was an English authority following *Lolley's Case* (1), viz., the case of *M'Carthy* v. *De Caix*. (2) That is the case of Lord Brougham's, and we are driven to consider to what extent we are bound by the decision of the Lord Chancellor sitting in a Court of Equity upon a question of law in the Probate and Divorce Court, whether that would be a binding authority. But upon a careful investigation of the facts of that case, however the point arose in Lord Brougham's mind and found its way into his judgment, that case was really not, and could not have been, any authority upon the question before us, because the point was neither raised in the pleadings, nor was it sustained by evidence capable of being made the subject of available argument for that purpose. He seems to have taken the point himself, and evolved the whole thing from some passages in a letter as to the man being a naturalised Dane. But independently of that, the fact upon which so much reliance was placed, namely, that he applied *Lolley's Case* (1) to the case of a marriage by a domiciled Dane in England, who was also a domiciled Dane at the time of the proceedings for divorce in Denmark, the facts which gave rise to that litigation never had appeared in any way in which the Court could take judicial notice of it. The only question in that case was whether the husband, who had taken out administration to his wife as surviving husband, who had an apparent interest in a gift as surviving husband, had, by certain letters which are set out in the proceedings, under the circumstances of the case conclusively bound himself to the gift of that which was supposed to be his own, and his right to which as the surviving

(1) Russ. & Ry. 237; 2 Cl. & F. 567.
(2) 2 Russ. & My. 614; 2 Cl. & F. 568.

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husband was not really in question. There was this further to be observed, that if the facts were as they seem to have been assumed in the note to the case furnished by Lord Brougham, to which I shall afterwards refer, that there had been a marriage in England by a domiciled Dane with an English lady, and that there had been a dissolution of that marriage in Denmark, the plaintiff the husband being still a domiciled Dane, and that that dissolution was not recognised by the English law as being of any validity, the result would have been, not that the property would have been distributed according to the English law, but that it would have been dealt with according to the Danish law; and the Danish law of course in the distribution of the assets of a Danish wife would have recognised its own divorce, and would not have been bound by any decision of this court in *Lolley's Case*. (1)

Therefore, really the point could not have been properly before the Court, or determined by the Court, and therefore fully warranted what was said of it in the case of *Geils* v. *Geils* (2) as something which fell from the learned judge per incuriam. The whole thing probably emanated from the application of *Lolley's Case* (1) to the case before him.

Well, that disposes of the only authority at all that in any way conflicts with the decision of the learned Lord President. And, upon principle, I cannot bring myself to doubt that what the Lord President has said is right, that if a domiciled foreigner comes here for the purpose of taking a wife from this country, the moment the marriage is contracted, the moment the vinculum exists, then the lady becomes to all intents and purposes of the same domicil as the husband, and all the rights and consequences arising from the marriage are to be determined by the law of that which by the actual contract of marriage becomes the domicil of both parties, exactly to the same extent as if they had both been originally of the foreign country. It seems to me that there is no qualification of that rule. A wife's home is her husband's home; a wife's country is her husband's country; a wife's domicil is her husband's domicil; and any question arising with reference to the status of those persons is, according to my view, to be determined by the law of the domicil of those

(1) Russ. & Ry. 237; 2 Cl. & F. 567. (2) 1 Macq. 255.

persons; assuming always that the domicil is a bonâ fide one, not a domicil either fictitious or resorted to for the sole purpose of altering the status. I am not however prepared to say that an English husband could, by going to a foreign country for the sole purpose of domiciling himself in a place where a marriage could be dissolved at pleasure, be enabled to obtain a valid and binding dissolution of his own marriage. That point it is not necessary for us to decide. But where the domicil is the real bonâ fide domicil of the husband, and consequently of the wife, the court, the forum of the country of that domicil, is the forum which has to determine the status; and has to determine whether the status was originally well created, and whether any circumstances have occurred which justify that forum in deciding that the status has come to an end.

I do not think it necessary myself to go further into the cases which have been cited, but I conceive that the principle which is laid down by the learned President is a sound principle and not capable of being questioned; and, that being so, there being in this case originally a marriage, where the marriage home was intended to be Scotch, the marriage became in that sense a Scotch marriage; that is to say, the union became a Scotch union, from the moment of the marriage: and there being further the fact that the parties in this case were domiciled in Scotland at the time the sentence of dissolution was pronounced, I think that that sentence of dissolution ought to be recognised in this country and by all other countries in the world.

COTTON, L.J. I am of the same opinion. I think a great deal of the difficulty in this case has arisen from the ambiguous use of the words "English marriage." We have been told the marriage in this case is an English marriage, and that therefore, according to *Lolley's Case* (1), and to what was said by the judges in that case, it is indissoluble.

The fallacy lies in this: the word "marriage" is used in two senses. It may mean the solemnity by which two persons are joined together in wedlock, or it may mean their status when they have been so joined. The solemnity by which they are

(1) Russ. & Ry. 237; 2 Cl. & F. 567.

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united in marriage, that is to say, the mode in which the marriage is solemnised, and the forms to be followed, must depend upon the law of the country where that solemnity takes place. When the marriage takes place in a country which is not the country of the domicil the country of the domicil will hold the persons as duly married if they have followed the forms and ceremonies required by the country in which it is solemnised. Of course I am speaking only of Christian countries, and that gets rid of what was put to us by Mr. Fooks, that we have here to consider what would be the consequences of dealing with the law of the domicil supposing it were Turkish. The rule I apprehend prevails universally that where a marriage has been solemnised according to the form and in the manner required by the place where it is celebrated, it will be recognised in the country of the domicil, and being recognised in the country of the domicil the persons will be recognised as married. That is their status. But there arises the question what are the incidents and liabilities of the status, and I take and adopt entirely what was said by Lord Westbury in the case of *Shaw* v. *Gould.* (1) "But this right to reject a foreign sentence of divorce cannot rest on the principle stated by the Vice-Chancellor in his judgment, namely, that where by the lex loci contractus the marriage is indissoluble, it cannot be dissolved by the sentence of any tribunal. Such a principle is at variance with the best established rules of universal jurisprudence, that is to say, with those rules which for the sake of general convenience and by tacit consent are received by Christian nations and observed in their tribunals. One of these rules certainly is, that questions of personal status depend on the law of the actual domicil."

What was the actual domicil here? The husband was, at the time of the solemnisation of the marriage in England, Scotch, and always so remained down to the time of the divorce; so that the domicil of the wife after she had been united in marriage to her husband, became Scotch, and throughout the case of *Warrender* v. *Warrender* (2) not a doubt was expressed as to the law which decided that case, that when a woman domiciled in one country marries in that country a man domiciled in another country, her domicil at once becomes that of her husband. That,

(1) Law Rep. 3 H. L. 55, 84.

(2) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.

I think, cannot be disputed or doubted. I know of no case which throws a doubt upon it. Of course that is entirely different from the question whether a husband and wife can be held to be domiciled in a country in which greater facilities are granted for divorce to which the husband has taken his wife in order to make her subject to the tribunals of that country, and to the consequences of her being brought within that jurisdiction. That is an entirely different question. But here, when the lady married a Scotchman, she consented and agreed that her domicil from that time forth should be that of her husband.

Then, we have to consider this question: Is this divorce an incident of the contract, and in any way to be governed by the law of the country where the solemnity took place, or is it a question of status? In my opinion, it is not a question in any way depending upon the rule that the lex loci contractus governs. That applies, as I have already stated, to the forms and solemnities by which the marriage is celebrated. When parties unite themselves in marriage, it is not part of their contract that according to the laws of the country where that marriage takes place they shall have the power or not to dissolve the marriage.

Any act done in violation of the duties incident to the status is a matter which concerns the country of the domicil, and, in my opinion, the question of divorce is not in any way an incident of the contract so as to be governed by the law of the country where that takes place; but an incident of the status to be disposed of by the law of the domicil of the parties if they are subject to the tribunals of that country. Here we have a real domicil throughout in Scotland, and in my opinion, the Courts of that country, not only for the purpose of status in that country, but for the purpose of status everywhere, have the power to entertain this question, and if they think fit to decree a divorce.

Is there any authority contrary to that? It is said that *Lolley's Case* (1) is against it. We have not any report which purports to give the exact words of the opinion given by the judges, but, no doubt we have an "English marriage" spoken of, and that is translated in one report as a "marriage in England." But we must remember, that, in that case (and we must regard what

(1) Russ. & Ry. 237; 2 Cl. & F. 567.

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was said by the judges in reference to the case before them), the marriage was in both senses an English one, because it was solemnised in England and the parties to the marriage were English people; their status was English and the marriage was solemnised in England; and we must, in my opinion, notwithstanding the expressions which were used and the ambiguity of the expression "English marriage," look at the facts of the case for the purpose of seeing what was intended to be there decided by the judges. In my opinion, that decision does not at all stand in our way in deciding this case, nor ought we to be deterred from giving a judgment in accordance with our opinions by anything that was said in *Lolley's Case.* (1) Now as to the case of *M'Carthy* v. *De Caix.* (2), I will add nothing to what was said by James, L.J. I quite agree with what he has said, and it is remarkable that in the case of *Shaw* v. *Gould* Lord Westbury (3) says: "The position that the tribunal of a foreign country, having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a bonâ fide suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's Case.* (1)" He mentions *M'Carthy* v. *De Caix* (2), but he does not consider that that was a decision which prevented him from laying down that as a principle independently of *Lolley's Case.* (1) Therefore, I think that that strengthens what has already been said by the Lord Justice James as to that case in reference to the present case.

Now we ought to notice what has been said as to *Niboyet* v. *Niboyet.* (4) It may be said that our decision there was in some way at variance with what we are laying down in this case. What was said by Brett, L.J., was in favour of the respondent to this appeal, and he was in a minority, but the decision of the other

(1) Russ. & Ry. 237; 2 Cl. & F. 567.
(2) 2 Russ. & My. 614; 2 Cl. & F. 568.
(3) Law Rep. 3 H. L. 55, at p. 85.
(4) 4 P. D. 1.

members of the Court turned entirely upon the construction of an English Act of Parliament, and they said, whatever might have been the consequences independently of those words, this Act of Parliament gives to us, an English Court, jurisdiction in the matter, and says what is to be the consequence if certain facts are proved in a suit and brought before us under the Act. That was the ratio decidendi in that case. As to *Warrender* v. *Warrender* (1), I may say I cannot look upon it as decisive of the present question, because, although there are principles laid down consistent with and leading to our decision, yet, in my opinion, the House of Lords carefully guarded themselves by saying that they were deciding the matter as a Scotch Court of Appeal, and not dealing with it as an English Court, or saying what the effect might have been in England. If we could have relied on that case as decisive, of course there would have been an end of the matter, but I cannot look upon *Warrender* v. *Warrender* (1) as decisive of the case before us.

LUSH, L.J. I am of the same opinion. It is obvious to me that the whole difficulty in this case arises from a mistaken use of a phrase in *Lolley's Case* (2), in which the marriage there in question is called an "English marriage." Now the phrase, "an English marriage," may refer to the place where the marriage was solemnised, or it may refer to the nationality and domicil of the parties between whom it was solemnised, the place where the union so created was to have been enjoyed.

Now in *Lolley's Case* (2) the phrase embraced both meanings. The parties there were English subjects domiciled in England, married in England, and they went to Scotland for a temporary purpose; and while there the one party sued the other for a divorce and obtained it. In the present case the words must be taken in reference only to one of those meanings, namely, the place where the marriage was solemnised, because this was a marriage solemnised in England, between a Scotchman domiciled in Scotland and an English lady whose domicil immediately the marriage was solemnised became his domicil. That being so, it strikes me I own that the conclusion at which we have arrived is a logical

(1) 2 Cl. & F. 488; 9 Bl. (N.S.) 89. (2) Russ. & Ry. 237; 2 Cl. & F. 567.

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sequence from the decision in the House of Lords in *Warrender* v. *Warrender* (1);—not the actual point decided there, because it was not before the Court,—but it seems to me, having regard to general convenience and propriety, that it follows naturally from the decision of *Warrender* v. *Warrender* (1), because what the Court decided there was, that in a case like this, where a domiciled Scotchman was married in England to an English lady, but whose domicil remained in Scotland, and the domicil of whose wife was therefore Scotch, he might sue for a divorce in the Court of Sessions of Scotland lawfully. They held therefore that a Scotch Court could dissolve in Scotland a marriage which had been created in England. Now to hold that the consequence of that is confined to Scotland, and to hold that a Scotchman, who was released by the law of his own country from the marriage tie in the country where his home was, should, as soon as ever he came over the border into England, be liable to be indicted for bigamy, is something that shocks all one's notions of morality and public convenience. No doubt, that consequence follows in a case exactly like *Lolley's Case* (2) so long as that decision stands; but we are asked to extend it very considerably, and whatever we may think of *Lolley's Case* (2), I think we shall be agreed in this, that it is not one that ought to be extended. There are anomalies enough already arising out of the marriage laws, and we ought to be very careful not to create another, and in this case we should be creating another of a very serious kind, if we were to hold that a man may be free in Scotland by the law of his own country, of his own home, to marry a woman there, and yet to be liable to be indicted for that very act as a bigamous act if he came over the border into this country. That is what we are asked to do. I confess there is something about that which shocks all one's notions of what is right and just and convenient; and if there were no other authority, I should have no hesitation myself in saying that *Warrender* v. *Warrender* (1) virtually decides it, because I hold it to be a logical and natural inference from the decision in that case that the union though it was created in England could be dissolved by the Scotch Court; and being dissolved, can no longer

(1) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.
(2) Russ. & Ry. 237; 2 Cl. & F. 567.

exist anywhere; and wherever the parties may happen to be the status is permanently altered.

Now as Mr. Fooks has referred to what is called "marriage" in a country where polygamy is the law, I must take the opportunity also of saying, in accordance with what has fallen from Lord Justice Cotton, that there is no analogy whatever between the union of a man and a woman in a country where polygamy is allowed, and the union of a man and a woman in a Christian country. Marriage in the contemplation of every Christian community is the union of one man and one woman to the exclusion of all others. No such provision is made, no such relation is created, in a country where polygamy is allowed, and if one of the numerous wives of a Mohammedan was to come to this country, and marry in this country, she could not be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country, a union falsely called marriage, as a marriage to be recognised in our Christian country.

As I said before, if there were no decision on the point, and no authority on the subject, speaking for myself, I should conclude, from *Warrender* v. *Warrender* (1), that our decision should be in favour of the validity of the divorce. But then we have authority. We have two, but unfortunately we have one on each side, because Lord Brougham's decision in *M'Carthy* v. *De Caix* (2) decides that in such a case as this the effect of it is confined to the country. Now observations have been already made upon that case, and I need not repeat them to shew that it is not really an authority at all. The point which the learned lord undertook to decide did not arise in the case. What he said upon it was only an obiter dictum, and contrary, I think, to all principle. We have another case decided some years afterwards by the Lord Chancellor of Ireland, Lord Blackburne, in which the facts were exactly similar, and, notwithstanding the case before Lord Brougham, that learned judge took an entirely different view, and that is an authority which commends itself to my judgment and one which I am very glad to be able to follow.

Therefore, viewing it on every side, however it may be, whether

(1) 2 Cl. & F. 488; 9 Bl. (N.S.) 89.
(2) 2 Russ. & My. 614; 2 Cl. & F. 568.

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upon principle or whether upon reliable authority, I come without hesitation to the conclusion that the judgment of the learned President was entirely right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitor for appellant: *S. A. Tucker.*
Solicitor for respondent: *T. S. Ward.*

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Feb. 1.

MUDGE *v.* ADAMS.

Will of Married Women—Protection Order—Wife's Lifetime—Action to prove Will and to discharge Order.

An application to discharge a protection order is not limited to the lifetime of the married woman.

A claim to pronounce against the validity of the will of a married woman who had obtained a protection order, and a counter-claim to discharge the protection order, may be included in the same action.

DEMURRER to the defendant's statement of defence and counter-claim.

The plaintiff as executor propounded a will dated the 13th day of February, 1880, of Mary Adams, late of No. 3, Manchester Street, in the county of Middlesex, deceased, who died on the 2nd day of June, 1880. He also alleged that the deceased was the wife of Henry Adams, the defendant, and was living separate from him and had obtained a protection order on the 14th day of January, 1860, and was possessed of separate estate, and was also entitled to make a will under a power contained in the will of her mother and bearing date the 22nd day of December, 1870. The plaintiff claimed a decree for probate of the will.

The defendant pleaded amongst other matters that the will was never executed or witnessed; that the deceased was not of sound mind, memory, and understanding at the time of the execution; that the protection order was obtained without his knowledge and by fraud and false representations; and that the deceased was not by virtue of any power entitled to make a will and had no separate estate. The defendant also by a counter-claim alleged that he, as the husband of the deceased, was entitled to all the property of which

she died possessed, that she had other property besides that over which she had, if at all, the right of disposal by virtue of the power, and other property acquired before the date of the protection order. And that the order was obtained without his knowledge by her fraud, and by means of false representations that the defendant had deserted her, whereas in truth and fact he never did desert her. The defendant claimed a declaration that the protection order is fraudulent and ought to be set aside, that the Court would pronounce against the will, and decree letters of administration to the defendant; or, in the alternative, a grant of letters of administration of such property as she had no power to dispose of by will.

The plaintiff obtained leave to plead and demur, and in reply (amongst other things) denied the averments in the statements of defence and counter-claim, and alleged that the allegations as to the protection order were "bad in substance, on the ground, amongst others, that it is not alleged that the said protection order has been revoked, and that it is not competent to the defendant in this proceeding to assail its validity." The reply also alleged that the defendant for a long time during the lifetime of the deceased knew of and acquiesced in the existence of the order, and is thereby now estopped from questioning its validity.

Bayford, for the plaintiff, in support of the demurrer. The deceased having obtained a protection order was, as to the disposal of her property, a femme sole: 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, ss. 7, 8, 9, and 10. The order extends to all property from the time of the desertion: *In the Goods of Ann Elliott.* (1) The husband has no right to any grant: *In the Goods of Stephenson.* (2) The statement of defence and counter-claim mix questions of law and fact and are embarrassing: *Stokes* v. *Grant.* (3) Any application for discharge of the order under 27 & 28 Vict. c. 44, s. 1, must be made in the lifetime of the wife.

Inderwick, Q.C., contrà. This would be the proper Court to set aside the order, and there is nothing in the Acts to limit the Court's power to the wife's lifetime. Fraud may always be pleaded.

(1) Law Rep. 2 P. & D. 274. (2) Law Rep. 1 P. & D. 287.
(3) 4 C. P. D. 25.

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Besides the Court must decide what, if any, was the separate property of the deceased and what passed under the power: *Tharp* v. *Macdonald.* (1) The Court can try in the same suit the validity of the will and of the protection order: Judicature Act, 1873, s. 24, sub-s. 3.

THE PRESIDENT. I am of opinion that the husband is entitled, though the wife is dead, to show that by reason of his absence and of fraud this protection order ought not to have been obtained, and that therefore it should be discharged.

As a general rule that which has been obtained by fraud can always be set aside by the person who has been defrauded, unless the interests of innocent persons have intervened. In this case it is alleged that the husband has been defrauded by the wife in his absence. He might have been a sailor away for years earning his livelihood, and on his return home have found that his wife had obtained a protection order, and thereby acquired the power of disposing of property which otherwise would have belonged to him. In such a case it would be a startling proposition to contend that he is to be precluded from saying that he has been wronged by the mere fact that his wife is dead. If the interests of other parties would be affected that is another matter; in the making of a will by the wife the rights of nobody else can be affected. The executors and legatees are persons claiming gifts made to them by the wife, and have no rights which there would be any injustice in setting aside, if the power of conferring these gifts is based upon a fraudulent transaction on her part. Besides, by the language of the 21st section, any person injured by the act of the wife, and claiming through the husband, would have the same rights as the husband. And it would be unreasonable to suppose that, while the legislature is interposing for the protection of the creditors of the husband or persons claiming under him, interference should have been limited in time to the duration of the wife's life. There would be just the same reason for protecting the creditor or the person claiming under the husband after the death of the wife as during her life. Of course there would be greater difficulties of proof, but that would be borne in mind by

(1) 3 P. D. 76.

whatever tribunal might have to determine the question whether the protection order should be set aside. The husband comes with a heavy burden upon him to establish that that which was done by his wife twenty years ago was done fraudulently, and of course if it can be proved he has been knowingly lying by, the burden imposed upon him will be still heavier.

But did the legislature intend, what it has not in any way said, that this proceeding must be taken during the life of the wife? The section enacts that a wife obtaining a protection order shall be in the same position and have the same rights as if she had obtained a judicial separation. And under the section which relates to judicial separation it is said that any husband or wife, upon the application of whose husband or wife, as the case may be, a decree of judicial separation has been pronounced, may at any time thereafter present a petition to the Court praying a reversal of the decree on the ground that it was obtained in his or her absence, and that there was reasonable grounds for the alleged desertion. The statute expressly says that in that case the application may be made at any time. I can see no reason for limiting the time in this case to the life of the party who has obtained the improper decree. The sections of the subsequent Act which have been referred to do not appear to me to affect the argument, and I am therefore of opinion that it is competent to the husband, or any one claiming under him, to apply for the discharge of the order though the wife is dead.

As to the form of these pleadings, I am of opinion, upon the best consideration I can give to the case, and it is certainly not free from doubt, that this pleading is good and that the demurrer ought not to be allowed. If the husband had proceeded by a separate action, the statute does not prescribe what the form of it should be; and it would be competent for me to give such general directions as I might think necessary for the purpose of doing substantial justice between the parties. For that purpose I should think it right to have not only the husband before me, but any persons who might be supposed to have an interest in the matter —as, for instance, the executor or other representative—and I should therefore require notice to be given, in order that he might have an opportunity of stating his case, just as in an ordinary

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suit, by a person claiming an administration and asserting his claim against the executor of an alleged will.

The 46th section of the statute under which I administer the divorce law directs "that subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the court where their attendance can be had shall be sworn and examined orally in open court." The mode of investigation—viz., by the examination of witnesses vivâ voce—is prescribed by that Act, and the husband would be able in those proceedings to apply to me, to use the language of the section, "to discharge the order." That he has already done, and if I were to direct other proceedings to be taken, those which have already been or may hereafter be taken in this matter would have to be repeated in another form, and much time and money would be wasted.

Even without the section of the Judicature Act to which I am about to refer, it would be in the highest degree convenient that any application to me should be dealt with by the use of all the powers of which I am at this moment possessed. So that, if I were called upon, while trying a probate case, to exercise the power which I possess as a judge having jurisdiction in matrimonial causes, I might dispose of all matters in dispute without putting the parties to the expense of double proceedings; but this I am now required by the Judicature Act to do. This case, indeed, is free from many difficulties which might be suggested if it were not a probate action in this division. For instance, it might have been an issue, devisavit vel non, relating to realty only, or an action of the wife against the husband, or a creditor for seizing some of her property, and seeking to recover a double value, or an action on a contract by the wife. In all those cases, in which the action must have been brought in another division difficulties might arise, as the judge would not have original jurisdiction to set aside the protection order. But in this instance the action is brought in the division which has jurisdiction also in matrimonial causes, and the Court is armed with the full powers derived from both those systems of procedure, and can therefore apply the rules which are prescribed by the Judicature Act. The 3rd sub-section of the 24th section of the Judicature Act, 1873, is

in these terms: "The said courts respectively"—that is, the High Court and the Court of Appeal—"and every judge thereof, shall have power to grant to any defendant in respect of any equitable estate, or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading; and as the said Courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner." The present case, in my opinion, is exactly within those terms. If this defendant had instituted a suit or proceeding for the purpose of setting aside the protection order, the action would have been against the same plaintiff as claiming under the alleged will of the wife, and the section says that what might have been asserted in that suit may be asserted by way of counter-claim in answer to the action of the plaintiff against the defendant.

I should observe that I am dealing with the pleadings as a whole. As a matter of refined argument, it may perhaps be said that if the plea had stood by itself it would not be good, because —and I agree with the argument—while the protection order is subsisting it must be respected. But by the counter-claim the defendant asks specifically that the protection order be discharged, which is exactly the relief he would pray in the proceedings if they had been instituted in an independent suit. For these reasons I am of opinion that the protection order may be set aside, and that the pleadings, including the counter-claim, are right; and I reserve all questions of costs until all the issues, which are very properly raised upon these pleadings, are determined.

Judgment for the defendant.

Solicitors for plaintiff: *Poole & Hughes.*
Solicitors for defendant: *Wedlake & Letts.*

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Feb. 17.

THE LONGFORD (1880, T. 592; 1880, O. 593; 1880, O. 842.)

Salvage—Bullion liable to contribute in the same proportion as other Property.

Where steam tugs rendered salvage services by towing a sinking vessel with passengers, cargo, and bullion on board into safety, it was held, that the bullion was liable to contribute to the salvage reward in proportion to its value rateably with the other property salved.

THERE were three consolidated actions of salvage instituted on behalf of the owners, masters, and crews of four steam tugs, the *Rover*, the *Mersey King*, the *Knight of Malta*, and the *Royal Alfred*, against the steamship *Longford*, her cargo and freight.

The *Longford*, on the 17th of August, 1880, was proceeding up the Mersey from sea with passengers, cattle, and other cargo, and a sum of 50,000*l.* in specie on board, when she came into collision with a steamship anchored in mid-river and received serious damage. The services rendered by the plaintiffs mainly consisted in attending the *Longford* and taking off a number of the passengers on board her whilst she was crossing to the Liverpool landing stage after the collision, and in towing her from the landing stage into shallow water alongside the wall of the Prince's Dock. The *Longford*, and the cargo on board her, except the specie, having been arrested in the consolidated actions, her owners and the owners of all the property arrested appeared as defendants, and undertook to put in bail.

On the 24th of November the district registrar at Liverpool ordered that the solicitors for the owners, master, and crews of the *Mersey King* and the *Knight of Malta*, the plaintiffs in action 593, should have the general conduct of the consolidated actions, but that the owners, master, and crew of the *Rover*, the plaintiffs in action 592, and the owners, master, and crew of the *Royal Alfred*, the plaintiffs in action 842, respectively, should be at liberty, if so advised, to deliver separate statements of claim, and to appear at the hearing by one counsel. A statement of claim was then delivered on behalf of the owners, masters, and crews of the *Mersey King* and the *Knight of Malta*, another on behalf of the owners, master, and crew of the *Rover*, and a third on behalf of the owners, master, and crew of the *Royal Alfred;* and on the

5th of January the solicitors for the owners of the *Longford*, and the owners of her cargo, other than the specie, delivered a statement of defence, containing, inter alia, the following allegations:—

1. The *Longford* is a paddle steamer of 476 tons register, with engines of 360 horse-power nominal, and at the time of the occurrences hereinafter mentioned she was bound on a voyage from Dublin to Liverpool, laden with a cargo of general goods and live stock, and manned by a crew of twenty-six hands. She had 136 passengers on board.

2. About 7.35 A.M. on the 17th of August, 1880, the tide being flood, the weather clear and fine, and the wind light from the S.E., the *Longford* was in the river Mersey making for her berth at the north end of the Liverpool landing stage, when she struck the stem of the steamship *Baltic*, which was lying at anchor, with the after end of her starboard sponson, and continued grazing her starboard-side till she got clear of the *Baltic*, when she continued her course towards the stage.

3. Whilst so proceeding, the tugs *Mersey King*, *Knight of Malta*, *Rover*, and *Royal Alfred*, put off from the Prince's landing stage and approached the *Longford*, hampered her movements, and finally one of them, the *Mersey King*, improperly threw herself across the bows of the *Longford*, which had to stop her engines to avoid a collision with the *Mersey King*. The other tugs then took up such positions that it was impossible for the *Longford*, which was under perfect command, to go ahead without risk of a collision.

4. When the *Longford*'s engines were stopped, the *Mersey King* placed herself on the *Longford*'s starboard bow, the *Knight of Malta* on the port fore sponson, the *Rover* on the port after sponson, and the *Royal Alfred* on the starboard quarter of the *Longford*. The *Knight of Malta*, without any request from the master and crew of the *Longford*, threw a rope on board the *Longford*, and it was hauled on board and made fast by the passengers, who were in a state of excitement; and some of them went on board the *Knight of Malta*.

5. With the way the *Longford* had upon her, and without any assistance from the tugs or any of them, the *Longford* shortly after the collision reached the landing stage, her starboard bow touching or nearly touching the stage. A rope was thrown from the *Longford* to the stage and was hauled on the stage for the purpose of being made fast, but some one from the stage hailed the captain to take the *Longford* to the dock wall, and the captain determined to do so, it being then reported to him by the engineer that the *Longford* was making water, and he would have been able to do so without assistance if he had not been hampered by the tugs, and thereupon the rope was thrown by some persons on the stage to the *Mersey King*, which then proceeded to tow the *Longford* towards the dock wall, which was distant about 130 yards only, and in less than five minutes the *Longford* was placed with her starboard bow along the dock wall.

6. After the *Longford* was beached alongside the wall the *Knight of Malta* left and took the passengers who were on board of her to the landing stage.

7. The *Mersey King* then backed alongside the *Longford* and some cattle were driven on board her by the drovers in charge of them. The *Royal Alfred* then came outside the *Mersey King*, and some of the cattle having been driven across

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the *Mersey King's* deck on board the *Royal Alfred*, the *Mersey King* and the *Royal Alfred* took the cattle to the landing stage and there landed them.

8. Some of the passengers with their luggage went on board the *Rover*, which was on the port after sponson of the *Longford*, and were taken by the *Rover* to the landing stage. The *Rover* then returned, took on board the rest of the cattle and landed the same.

9. The defendants say that the value of the *Longford* is 14,000*l.*, of the freight and cargo 8000*l.*, and of the specie 50,000*l.* As to the said specie the defendants, the owners of the *Longford* and of her general cargo and freight, say the said specie was and is the property of the Bank of Ireland, and at the time of the alleged services was in charge of a clerk of the said bank, and that the defendants, the owners of the *Longford*, are in no way responsible for the keeping or delivery of the said specie, and that the said specie having been taken on shore by the said clerk before the arrest of the *Longford*, and before the undertaking to put in bail in any of the said actions, the said defendants and the bail are not liable to the plaintiffs or any of them in respect of the said specie or any part thereof.

10. The defendants deny that the said alleged services of the *Knight of Malta*, *Rover*, and *Royal Alfred* were salvage services.

11. The defendants do not admit that the said alleged services of the *Mersey King* were salvage services, and further say that the said alleged services were rendered necessary by the improper conduct of those on board the *Mersey King*, and not otherwise.

Subsequently to the delivery of the above-mentioned statement of defence the specie lately on board the *Longford* was arrested, and an appearance in the actions was entered on behalf of the Bank of Ireland and the Corporation of the Royal Exchange Assurance, in respect of their interest as the owners and insurers of the specie, and their solicitors on the 3rd of February, 1881, delivered a statement of defence, which, after alleging that a sum of 50,000*l.* of sterling gold coin, owned by the Bank of Ireland, and insured by the Royal Exchange Assurance Company, was on the 17th of August, 1880, in charge of a clerk being carried on board the *Longford*, and setting up the same case as set up in paragraphs 3, 4, 5, of the statement of defence of the owners of the *Longford*, proceeded as follows:—

The clerk in charge of the said 50,000*l.* landed therewith from the *Longford* without any aid or assistance from any of the said tugs or their crews; nor did he nor did any one, authorized in that behalf, request or accept any aid, service, or assistance of any kind soever, either to, or for, or in respect of, the said 50,000*l.*, or the protection, landing or delivery thereof, or for or on behalf of himself or of these defendants, from the said tugs or their crews or any or either of them.

The defendants say that the said gold was never in any danger of loss.

They also say that it never was in any danger of damage.

They deny the rendering of any services of any kind to or the acceptance hereof by them or to or by any person or persons on their behalf.

Alternatively, these defendants say that if any services were rendered by the said tugs to the *Longford* her cargo and freight (which as aforesaid they deny) such were not nor were any of them salvage services in fact, and also that they were not nor were any of them efficacious as such, because these defendants say that if the alleged services had not been rendered no other or further or more serious consequences or damage could or would have ensued than did in fact ensue after and notwithstanding the rendering (if any, which is denied) of the alleged services.

Feb. 16, 17. The action was heard before the judge, assisted by two Elder Brethren of the Trinity House. Witnesses on behalf of the respective plaintiffs were examined orally in court. No witnesses were called for the defendants. The result of the evidence appears from the judgment. It was admitted that the value of the property, proceeded against other than the specie, amounted to 3200*l.* It was also admitted that the specie was not taken on board any of the steam tugs, and that the clerk in charge of it had landed from off the *Longford*, and removed the specie without any assistance from the salvors.

Butt, Q.C., and *W. R. Kennedy*, for the owners, masters, and crews of the *Rover*, the *King of Malta*, and the *Mersey King*. It was owing to the exertions of the plaintiffs that the *Longford* did not sink in deep water. The time occupied in rendering the services was very short, but that circumstance by no means renders the services less meritorious.

E. C. Clarkson, for the owners, master, and crew of the *Royal Alfred*.

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *G. Bruce*, for the owners of the *Longford*, and the rest of the property proceeded against, other than the specie.

Cohen, Q.C., and *Pollard*, for the owners and underwriters of the specie, admitted that the specie was liable in respect of life salvage if the Court should find that the services rendered entitled the plaintiffs to claim in respect of life salvage: *The Cargo ex Schiller* (1); *The Cargo ex Sarpedon*. (2) The material services in this case consisted in towing the *Longford* into shallow water. The specie derived little or no benefit from the assistance of the salvors. The Court in awarding salvage

(1) 2 P. D. 145. (2) 3 P. D. 28.

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remuneration in cases where a perishable cargo is salved has always treated the services rendered as more meritorious, and to be more highly rewarded than where services are rendered to specie or bullion, which, on account of its small bulk, can easily be removed to a position of safety, and in most cases, at the worst, is merely exposed to the danger of sinking, together with the ship on which it is carried, when, as would have been the case here, it can easily be recovered by divers. If then the specie here had been salved at a different time from the other property in this case, the owners of the specie, according to this principle, would have had to pay in proportion a much less salvage reward than the remaining defendants would have had to pay for the salvage services rendered to their property. The same consequences ought to follow where, as in the present case, the specie and the other property proceeded against have been salved on one and the same occasion. The policy of the general rule that all property salved should contribute rateably to salvage reward is undoubted; but it has been recognised that this general rule does not apply to silver or bullion: *The Emma* (1), and consequently in the present case the owners of the specie ought only to contribute in proportion to the benefits they have received.

Butt, Q.C., in reply. No distinction is made in practice, or ought to be made, between the contribution to salvage awards by silver or bullion, and other salved goods. One general rule is applicable in all cases. Indeed, in the case of *The Jonge Bastiaan* (2), where, as in this case, a quantity of specie was taken from a salved vessel before the salvage service terminated, Lord Stowell expressly refused to uphold a similar contention to that now raised by the owners of the specie: *The Vesta.* (3)

SIR ROBERT PHILLIMORE. This is a case of salvage service rendered in August last, in the river Mersey, to the steamship *Longford*, of 1000 tons gross, and 476 nett register tonnage. The *Longford* was on a voyage from Dublin to Liverpool laden with a general cargo, passengers, and live stock. It appears that at the time at which the salvage service in the case was rendered,

(1) 2 W. Rob. 315; 3 N. of C. 114.
(2) 5 Rob. 324.
(3) 2 Hagg. 189.

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the *Longford* had, by careless and bad navigation, impaled herself on the stem of the screw steamship *Baltic*. In consequence of so doing the *Longford* received a wound of a very serious character in her side, and was most seriously injured. Perhaps the best course for the Court to adopt in this part of its judgment will be to refer to the log of the *Longford*, which contains this entry:

On the 16th of August sailed with passengers, cargo, and cattle, wind east, fresh breeze; passed the Collingwood Dock at 7.20 A.M. On the 17th proceeded to landing stage, weather hazy, and while swinging to the tide, passing between two large steamers, our ship did not come round as quickly as I expected, when we fouled the White Star steamer *Baltic*, at anchor in mid-river, her stem damaging our plates on the starboard side; ship commenced to fill with water; kept the engines at full speed to reach the dock wall. The tug *Mersey King* took our rope and towed us to the wall of the Princess Dock, steamer *Rover* taking passengers and luggage; *Mersey King*, *Rover*, and *Royal Alfred* taking cattle. About this time passengers commenced to jump on board the tugs.

There is no doubt, therefore, that this vessel, the *Longford*, was in the most imminent danger of sinking. She steamed across the river to the Prince's landing-stage, and she was attended by four tugs, all of about the same size—the *Rover*, the *Mersey King*, the *King of Malta*, and the *Royal Alfred*. When the *Longford* got over to the other side of the river at the north end of the landing-stage, she was taken in tow by the *Mersey King*, which had stationed herself ahead, and was towed to the dock wall, where she was beached and sank.

Now the merit of the service thus rendered consisted in its promptitude, and not in the length of its duration. It is said that more steam tugs were employed than were needed; but it must be remembered that in these cases it may be more easy to say this after the danger is over than at the time of its occurrence, when any such calculation as to the degree of danger cannot be made with nicety. It appears to us that these steam tugs are entitled to take equal shares in whatever award the Court may make. There were 162 persons on board the salved vessel, 182 cattle, and specie to the amount of 50,000*l*., and the value of the whole property proceeded against amounts to 72,000*l*. There was undoubtedly in this case a salvage service rendered both to life and to property. The defences set up on behalf of the defendants originally were firstly, that the tugs, instead of assisting, hampered the *Longford*; and the second, that the *Mersey King* improperly threw herself

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across the bows of the *Longford*. Neither of these charges are proved. The Court, therefore, has to consider what is the proper amount of salvage remuneration to be awarded. Much discussion has taken place upon the question as to the extent to which certain bullion which was on board the *Longford* ought to contribute to the payment of salvage of property in this case. It appears that the specie being in bags and otherwise protected from loss, was not exposed to the same peril of being entirely lost as it would have been if the circumstances had been different. Among the authorities cited as to the proportion in which bullion ought to contribute to the award was a dictum of Dr. Lushington in the case of *The Emma*. (1) In that case, salvage services had been rendered to a ship and her cargo; but as regards the ship, the salvage had been settled out of court, and the only property proceeded against was the cargo, and in the judgment of Dr. Lushington, as reported in the second volume of William Robinson's Reports, there is the following passage :—

> Now in this class of cases the ordinary usage of the Court, which is well known to every person who has practised in it, is to take the whole value of the ship and cargo and assess the amount of remuneration upon the whole, each paying his due proportion. I am not aware, excepting in the instance of silver or bullion, that any distinction has ever been taken, or that parties have been admitted to aver that the services were of greater importance to the ship than they were to the cargo, and therefore that the ship should bear the lesser burden, or vice versa. Such a distinction, if acknowledged, would in many cases lead to intricate litigation and questions of great nicety, which it would be exceedingly difficult for the Court to adjust. With respect to silver and bullion, it is true that a distinction is wisely and properly admitted, and this upon the consideration that it is more easily rescued and preserved than more bulky articles of merchandise.

The case of *The Emma* (1) is not, however, the only authority on the question, for during the argument the attention of the Court has been drawn to other cases material to the point, and especially to the case of *The Jonge Bastiaan* (2), decided by Lord Stowell in 1804, where salvage services had been rendered to a derelict vessel, a portion of the cargo of which had been composed of bullion, and the very same contention as in the present case was raised, but was not sustained by the Court. And from a consideration of these cases it is clear to me that if in the case of

(1) 2 W. Rob. 315; 3 N. of C. 114. (2) 5 Rob. 124.

silver or bullion any such exception as that referred to in the case of *The Emma* (1) existed in practice, some mention would have been made in the report of the case of *The Jonge Bastiaan* (2), either of such exception or of some authorities tending to support it, but the case as reported contains nothing to lead to the conclusion that specie salved is not in the same position as any other salved cargo. It appears to me that the Court would be involved in great difficulty if it admitted any other principle in salvage cases than that every description of property salved must, whatever be its nature, contribute equally in proportion to its value towards payment of the amount of salvage remuneration awarded. It must be understood that I found my judgment in this case on that principle, and the defendants must contribute to the award I am about to make in proportion to the value of the salved property belonging to them respectively. I shall award 1200*l.* as the entire amount of salvage remuneration, to be equally divided among the four steam tugs. In other words, the owners, master, and crew of each steam tug will be entitled to 300*l.*

The plaintiffs, other than the owners, master, and crew of the *Royal Alfred* will have their costs. With regard to the costs incurred by the owners, master, and crew of the *Royal Alfred,* I think the justice of the case will be met by their being allowed such costs as they would have been allowed if they had not appeared separately by counsel and had been held entitled to costs. My attention has been drawn to the fact that the district registrar at Liverpool gave leave to the owners, master, and crew of the *Royal Alfred* to appear at the hearing by one counsel. I wish it to be understood that in all cases where any order is made for a party to be at liberty to appear separately by counsel, it must be considered to be one of the terms of such order that it is granted subject to the disallowance of costs at the hearing.

Solicitors for owners, master, and crew of the *Rover,* the *Mersey King,* and the *King of Malta: Bateson & Co.*

Solicitors for owners, master, and crew of the *Royal Alfred: Hill & Dickinson.*

Solicitors for defendants: *Simpson & North.*

(1) 2 W. Rob. 315; 3 N. of C. 114.

(2) 5 Rob. 124.

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March 22.

[IN THE COURT OF APPEAL.]

THE ALHAMBRA. (1880 E. 45.)

Charterparty—Meaning of words "Safe Port, or as near thereunto as she can safely get, and always lay and discharge afloat"—Rights of Parties when Ship is unable to lie afloat in Port of discharge without being lightened—Evidence of custom of Port.

Where a vessel is chartered to proceed with cargo to a "safe port .... as ordered, or as near thereunto as she can safely get, and always lay and discharge afloat," the master is not bound to discharge at a port where she cannot, by reason of her draught of water, "always lie and discharge afloat" without being lightened, even if she can be lightened with reasonable dispatch and safety in the immediate vicinity of the port or in the port itself.

A vessel was chartered to proceed with a cargo of grain from Baltimore to Falmouth for orders, "thence to a safe port in the United Kingdom as ordered, or as near thereunto as she could safely get, and always lay and discharge afloat." The vessel was ordered to Lowestoft. Her draught of water when loaded was such that she could not lie afloat in Lowestoft Harbour without discharging a portion of her cargo, but the discharge of cargo might have been carried on with reasonable safety in Lowestoft Roads. The consignee offered at his own expense to lighten the vessel in the roads, but the master refused to proceed to Lowestoft to discharge, and went to Harwich as the nearest safe port, and there discharged the cargo:—

Held, reversing the decision of Sir R. Phillimore, that the consignee could not recover damages against the shipowner for the refusal of the master to discharge at Lowestoft.

Held, also, that evidence that it was the custom of the port of Lowestoft for vessels to be lightened in the roads before proceeding into the harbour was not admissible.

This was an appeal from the decision of Sir R. Phillimore. (1)

On the 8th of November, 1879, the *Alhambra* was chartered "for a voyage from Baltimore to Queenstown or Falmouth (master's option) for orders, thence to safe port in the United Kingdom, . . . or as near thereunto as she could safely get, and always lay and discharge afloat . . . lighterage (if any) always at the risk and expense of the cargo."

On the 5th of January, 1880, the ship having arrived at Falmouth, the master received orders from Everett & Co., who had become the purchasers of the cargo, to proceed to Lowestoft and there discharge the cargo.

(1) 5 P. D. 256.

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The *Alhambra's* draught of water when loaded was 16 ft. 6 in. The average high water in Lowestoft Harbour was about sixteen feet, and the average low water about eleven feet.

The master objecting to discharge in Lowestoft, Everett & Co. gave him notice that they were prepared, at their own expense, to lighten the vessel in Lowestoft Roads sufficiently to enable her to lie always afloat in Lowestoft Harbour, if necessary, should her draught of water so require. The master nevertheless went on to Harwich, as the nearest safe port, and there discharged the cargo, which Everett & Co. received under protest, and then brought the action against the owners of the ship, claiming damages for breach of the contract.

In the Court below evidence was adduced that it was the custom for vessels, which were too deep to enter the port of Lowestoft, to discharge a portion of their cargo in the roads outside, and that it could be done with reasonable safety.

Sir R. Phillimore held that the plaintiffs were entitled to damages for breach of contract.

The defendants appealed.

Butt, Q.C., and *Clarkson, Q.C.*, for the defendants. The master was not bound by the charterparty to go to Lowestoft but to a "safe port."

[BRETT, L.J., referred to *Shield* v. *Wilkins* (1) as to what is the meaning of the words "safe port."]

A "safe port" within the meaning of this charterparty means a port safe for a vessel of the class of the *Alhambra* to go into, loaded to her draught of water, and where she could always lie and discharge afloat. The *Alhambra's* draught of water when loaded was 16 ft. 6 in., and it is proved in evidence that the low water in Lowestoft Harbour never exceeded 13 feet, and averaged 11 ft. 6 in. Lowestoft, therefore, was not a safe port for the *Alhambra*, and he was not bound to go there; nor was he bound to lighten her in Lowestoft Roads even if it could have been done with reasonable safety. In the Court below objection was taken to the reception of the evidence as to the custom of lightening ships in Lowestoft Roads, and it is not admissible.

(1) 5 Ex. 304.

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In all the cases cited in the judgment below, either the port was named in the charterparty or the master had accepted orders as if the port was named in the charterparty, and in such cases the charterparty is always read as if the name of the port had been inserted in it. Here the port was not named, nor had the master accepted orders for a named port. Even if the principle of *Hillstrom* v. *Gibson* (1) governs this case the defendants are not within it, because the amount of lightening the *Alhambra* would have required would have been unreasonable and excessive. In *Capper* v. *Wallace* (2) it was held that one-third was a reasonable amount of lightening. Here the evidence shews that at least two-thirds of the cargo must have been taken out before she could have entered Lowestoft Harbour, and always laid and discharged afloat.

Milward, Q.C., and *Aspinall*, for the plaintiffs. The real question is, what is the custom of the particular port to which the ship was ordered.

[JAMES, L.J. How can evidence of that be admissible to construe a charterparty? Here it is really a question of the construction of the charterparty.]

When a ship is ordered to a named port, the master, when he gets there, should conform to the custom of that port as to the manner in which cargo is discharged. For this purpose, the evidence is admissible: *Postlethwaite* v. *Freeland*. (3)

The evidence shews that Lowestoft Roads are large—sufficient for 200 sail—and that the custom is to lighten ships of the tonnage of the *Alhambra* before they go into the harbour. She could have been lightened in Lowestoft Roads whenever she pleased and with reasonable safety. Lightening a ship anticipatory to her entering harbour or port of discharge is not unreasonable: *Hillstrom* v. *Gibson*. (1) Lowestoft, therefore, according to the custom, was a safe port within the terms of the charterparty for the *Alhambra*. The order to go to Lowestoft meant "go to Lowestoft Roads and do what is usual there to lighten the ship sufficiently to enable her to proceed into Lowestoft Harbour." Lowestoft Roads are a part of the port of Lowestoft in ordinary and seafaring language.

(1) 8 Sess. Cas. 3rd Series, 463; 3 Mar. L. C. 362.

(2) 5 Q. B. D. 163.

(3) 4 Mar. L. C. 303.

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JAMES, L.J. I am of opinion that the question in this case depends really upon the construction of the words used in the charterparty. The owner of the freight, that is the person chartering the ship, had a right to order the ship to proceed to any safe port to deliver there, or to go as near thereto as the ship could safely get, and there to "always lay and discharge afloat."

Upon the construction of the charterparty, independent of the evidence that the experts gave as to what is meant by a safe port, I am of opinion that the plain meaning of the expression a safe port is a port in which the condition of safety was to be got which is referred to afterwards, that is to say, a port into which she could "safely get and always lay and discharge afloat."

That is the place to which she has contracted to go. She has not contracted to go somewhere something like it, or with a little variation from it, or a little change from it which the party ordering her to go may require. The master says "No, you must name me a port and I will go to that port if I can get there, and if from any accident afterwards, or from any cause not my own fault I cannot get there, I will get as near thereto as I can safely get still complying with the conditions given me at first, that is to say, to go to a port where I can get and safely lay and discharge afloat."

Then the question is whether Lowestoft is a port of that kind.

Now it is conceded that Lowestoft is not a port in which a ship of the size and burden of this ship could safely lay,—there is no peculiarity in the ship, she did not differ from any ordinary ship, she was as far as we can see an ordinary ship of ordinary build and ordinary construction,—nor a port in which there is a sufficient draft of water for a ship drawing sixteen feet when she is loaded.

It is also admitted that at low water there is ordinarily not more than eleven feet of water in the harbour. In my opinion, therefore, that was not a safe port. It appears to me that it is not made a safe port—it is not made a port in which the ship can lay with safety and discharge afloat—by reason of this, that there is something outside, some little distance from the port, a place in

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which the ship can lay afloat, and within which place she can discharge part of her cargo, and then when she has discharged a sufficient part of her cargo she can get into the port which is named. That may be all very well, it may be an unreasonable thing or a reasonable thing, but that is not the bargain the parties have entered into. They never entered into a contract to go somewhere not a safe port, to go to a port which would be safe if they stopped at some other place near it and with a little manipulation of the cargo made the ship fit to go into that port. That was not the bargain. The bargain was a plain bargain in plain English, that she should go to a port, provided the other party named a port, which in itself and by itself was a port safe for a ship of such a burden, and complied generally with the other requisites mentioned in the charterparty.

I am of opinion under the circumstances that Lowestoft was not such a port, and that therefore the defendants are entitled to the judgment of the Court.

BRETT, L.J. The question here is what was the sort of port to which, when the ship arrived at Falmouth or Queenstown for orders, the charterers or the person representing the charterer had a right to order the ship to go.

It seems to me that the first necessity was that they should order her to go to a port, to something which is known in seafearing language as a port. Secondly, it should be a port in which she might always lay and discharge afloat, and, according to my view, the meaning of that is that it should be a port in which from the moment she went into it, in the condition in which she was entitled to go into it, she should be able to lay afloat, and that she should be able to lay afloat until the time when she was fairly discharged.

The condition in which she was entitled to go into this port was as fully loaded, and she was not bound to unload before she got into that port. Therefore the meaning of it is that she was entitled to be ordered to a port in which when she was fully loaded she would be able to lay afloat, and a port which would remain in such a condition that she would be able to lay afloat from that moment until she was discharged in a reasonable way.

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But there is something more than that. It must not only be that, but it must be safe. Therefore, if she was ordered to a port in which she could lay afloat from the beginning to the end, but in which she would not be safe laying afloat (there may be such ports), she was not bound to go to that port.

The question is whether Lowestoft was a port into which, taking that construction, these consignees of the cargo were entitled to order her to go. They ordered her to go to Lowestoft.

The meaning of that to my mind, considering what Lowestoft is shewn to be, is not to go to Lowestoft Roads but to go to Lowestoft Harbour. Therefore the question must be whether Lowestoft Harbour was a place into which she could go fully loaded, and lay afloat from the moment she went into it, so fully loaded, until she was discharged. In my opinion it was not.

But then it is said she could have done that if she partially unloaded in Lowestoft Roads, and the custom is vouched. It seems to me that that custom is inadmissible, because it is a custom to apply to a contract where she is only bound to go into Lowestoft, something to be done before she gets to Lowestoft. The evidence to my mind was inadmissible. Therefore, it seems clear to me that Lowestoft was a port to which they were not authorized to order her.

The case of *Shield* v. *Wilkins* (1) seems to me to be authority precisely in point as to the principles of this decision. I will say nothing about *Hillstrom* v. *Gibson*. (2) I will reserve my view of how far one is bound to follow that case, until the point which was decided in it arises. It does not seem to be applicable to the present case.

COTTON, L.J. I am of the same opinion. What we have to consider is this, whether the charterer had a right to order the captain of the vessel to proceed to Lowestoft.

That depends upon the construction of the charterparty. The place to be named is to be a safe port within certain limits; and there is this also in the charterparty—although not immediately following—"where she can always lay and discharge afloat."

In my opinion, simply taking the construction of this charter

(1) 5 Ex. 304. (2) 5 P. D. 256.

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(for I think the evidence as to what is meant by a "safe port" could not be safely admitted. A safe port here means a port safe for this vessel loaded, that is to say, one into which such a vessel loaded can safely get. And in that construction I am supported very much by what was said by Lord Cranworth in his judgment in the case of *Shield* v. *Wilkins* (1).

But there is something more here. We have in this charterparty an explanation of this word "safe," for though there may be a doubt whether those words: "and always lay and discharge afloat" apply primarily to the port of discharge, yet in my opinion it does shew what in this charterparty is meant by a safe port, i.e., one into which the vessel in its loaded state can safely get, and in which it can "always lay and discharge afloat."

The only question we have to consider is this, whether on the evidence Lowestoft was such a place, or whether there was anything as regards the custom which, notwithstanding it was not, can justify the charterers in ordering the ship there. Whether Lowestoft was such a place must depend upon this, whether the roads were Lowestoft. The roads were not the port. The roads were not a part of the port of Lowestoft, and when the charterer ordered the ship to go to Lowestoft, the charterparty only authorizing the ship to be sent to a port, he must have meant to the port of Lowestoft, and not to Lowestoft Roads. Therefore, in my opinion, though the ship might have safely unloaded whilst laying afloat in the roads, that will not save the charterer and enable him to say he had a right to require the ship to go to Lowestoft.

It is said there is a custom of this port, and that that makes a difference. It is perfectly true that when a ship has to go to a port, and there are stipulations as to the time of unloading, the unloading must be according to the custom of the port to which she is bound to go; that is to say, if the custom in the port is that the ship is bound to go to unload part of her cargo at a particular place, and then to go up to the wharf and unload the remainder, that construes, if there is nothing expressly in the contract to the contrary, the obligations of the parties under the charterparty. But it is said here, where the construction of the

(1) 5 Ex. 304.

contract is that the port mentioned is to be one into which the ship loaded can safely go and lay afloat and discharge, that is to be varied by this fact, that at this particular port ships never do go loaded into port, but stay outside the port and there take out part of their cargo before they go in. But, in my opinion, that custom, if it is proved, is in no way admissible to control what is the true construction of the charterparty, independently of any such custom proved. When the port is named, then the custom of the port may regulate certain things not expressly provided for in the charterparty. But in my opinion, the custom of the port as to the way in which ships are dealt with before they go into the port, cannot shew that the port is one to which the charterer had a right under this charterparty to order the ship to go, if without any such custom it would not have been such a port.

JAMES, L.J. I did not say anything about the custom, but I will sum up in a few words my view of it.

The custom alleged here is that Lowestoft does not mean Lowestoft, but means something else.

Appeal accordingly allowed with costs.

Solicitors for plaintiff: *Hughes, Hooker, Buttanshaw, & Thunder.*
Solicitor for defendant: *H. C. Coote.*

1881
March 23.

[IN THE COURT OF APPEAL.]

THE MARGARET. (1879 H. 310.)

Collision—Contributory Negligence—Damages—Infringement of Thames Bye-laws—Cause of Action.

A dumb barge, by the negligent navigation of those in charge of her, was suffered to come into contact with a schooner moored to a mooring buoy in the river Thames. The schooner had her anchor hanging over her bow with the stock above water, contrary to the Thames bye-laws. The anchor made a hole in the barge and caused damage to her cargo. But for the improper position of the anchor neither the barge nor her cargo would have received any damage. In an action of damage by the owners of the barge against the schooner:—

Held, reversing the decision of the Admiralty Court, that both vessels were to blame, and that therefore the owners of the barge were entitled to half the damage sustained.

THIS was an appeal from the decision of *Sir R. Phillimore.* (1)

The action was instituted by the owners of the dumb barge *E Wo* against the schooner *Margaret*, for damage caused to the cargo on board the *E Wo* under these circumstances:

The *Margaret* was anchored at a proper place in the river Thames, but having her anchor swinging by the cable perpendicularly from the hawse, with the stock of the anchor not awash, which was contrary to the 20th rule of the rules and bye-laws for the navigation of the river Thames.

The *E Wo* was proceeding up Blackwall Reach with a cargo of tea, and was being navigated by two men who were rowing her, and by reason of their negligence she came into contact with the *Margaret* and the fluke of the *Margaret's* anchor penetrated the side of the barge, making a hole through which the water entered and damaged the cargo of tea.

SIR R. PHILLIMORE held the *E Wo* alone to blame, and dismissed the action with costs.

The plaintiffs appealed from the decision.

Butt, Q.C., and *Raikes*, for the plaintiffs. The schooner sustained no damage at all. The only damage to the barge was

(1) 5 P. D. 238.

caused by the fluke of the anchor penetrating her side. It is proved by the evidence that if the stock of the anchor had been awash, the fluke of the anchor would not have touched the barge but would have gone under it. Therefore it was the schooner's negligence which caused the collision and the whole of the injury, and therefore she is liable in damages for that injury. The penalty imposed by the Thames Conservancy Rules for an infringement of those rules is no bar to an action of damage where damage has arisen from such infringement. There was no doubt some contributory negligence on the part of the plaintiffs to the collision, but still there would have been no damage at all if the anchor had been properly hung. A man may be a trespasser on the land of another and yet may bring an action for damage arising to him there, if the cause of the damage is improperly there: *Barnes* v. *Ward*. (1) Admitting the barge was unlawfully where she was at the time of the collision, quâ trespasser, yet the anchor was also unlawfully there and caused the injury. The cases of *The Gipsey King* (2) and *Sills* v. *Brown* (3) really do not throw any light on this case. The judge founded his decision on the question, who was liable for the collision? But the true test is, Who first contributed to the cause of action? At any rate, if there has been contributory negligence on the part of the plaintiffs, they are entitled to half the damage sustained.

Milward, Q.C., and *Clarkson, Q.C.*, for the defendants.

[JAMES, L.J. We have no doubt that the barge was negligently navigated.]

Then that was the cause of the collision and the defendants are not liable. The whole real *causa causans* was the negligence of the barge.

[JAMES, L.J. Suppose the anchor had been properly hung, would there have been a cause of action?]

Probably not, but, *non constat*, there might have been some damage. The first contact was complete in itself and was caused by their action. Therefore it was their clear neglect of duty which contributed to the collision, and they were the parties who

(1) 9 C. B. 392. (2) 2 Wm. Rob. 537.
(3) 9 C. & P. 601.

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caused the collision. That being so, the defendants are not liable for the injury resulting from that collision. The negligence which caused the collision was also the cause of the damage. The plaintiffs therefore substantially contributed to the occurrence of the injury. The *Gipsey King* (1) is really an authority in favour of the defendants.

Butt, Q.C., in reply.

JAMES, L.J. In this case we have no doubt that the barge was negligently navigated, but it appears to me that we must consider what the form of the action is, and how the damage was caused. The action is by the owner of the barge who says, "Your anchor was in an improper place, and by its being so improperly placed my barge came into contact with it. It made a hole in my barge, and did a great deal of damage." That is the cause of action. The damage was done immediately by the contact of the improperly placed anchor with the barge. Is it a conclusive answer to say, "True it is I had my anchor improperly placed; true it is it came into contact with your barge; and true it is that if the anchor had not been there no damage would have been done. But you are the person who led to the wrong, because if your barge had not been improperly navigated, the collision would not have happened, and the damage would not have occurred; and therefore it was you who caused the damage." It appears to me that that plea cannot be sustained. The true plea would be to say, "True, it is my negligence caused your damage, but without your negligence my negligence would have caused you no damage." There is no contributory negligence unless it leads substantially to the cause of action. This is simply a case in which both parties are equally to blame, because both parties through their own fault caused the damage. Therefore, according to the Admiralty rule, the damage is equally divided between them.

BRETT, L.J. It seems to me that in deciding this case the Court must determine what is the legal liability of the parties, and in order to do that the Court must deal with the cause of

(1) 2 Wm. Rob. 537.

action, and must determine whether there is any liability on the part of the defendants with regard to the cause of action, and, if so, what the legal character of that liability is. Now the cause of action in collision cases is not merely the fact of the ships having come into impact with one another, for that by itself is no cause of action, but that damage in the sense of injury was caused to the property of the plaintiffs by reason of that collision. Therefore, even in a case in which there is no contributory negligence charged against the plaintiffs, it is not sufficient for the Court to find that there was a collision in point of fact, and that the collision was caused by the negligence of the defendant. There is no cause of action established by that, although in 999 cases out of 1000 that is sufficient, because there has been some damage done. But in order to establish a cause of action, the Court must find not only that there was a collision, and that it was the result of the negligence of the defendants, but that some damage was done, these being found the liability is made out and the cause of action is established. But if it be asserted that the plaintiff was guilty of contributory negligence: Then the question is, what is contributory negligence? To my mind, strictly stated, it is whether the plaintiff has by negligence of his own contributed to that which is the cause of action, and not merely to the collision. Here you have the fact that the collision is caused by the negligence of the barge, and I cannot see myself that the fact of the impact was assisted by anything done on the part of the schooner. But there would have been no damage at all, and no cause of action at all, but for the fact of the anchor being improperly placed, which was a wrongful act. The schooner was therefore to blame, and, had not the barge been at all to blame, the schooner would have been liable to the whole of the damage. But the barge was to blame so as to contribute to the cause of action, and by reason of this bit of negligence on her part she came into contact with the anchor. The barge and the schooner both were wrong, and therefore according to the rules of Court of Admiralty the damages ought to be divided.

COTTON, L.J. I have come to the same conclusion. The question is, have the plaintiffs a right to recover on account of

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the damages caused by the improper manner in which the defendant's anchor was hung? The ground of the plaintiff's claim is, that the anchor of the schooner was improperly hung; but the plaintiffs themselves were in fault in navigating their barge negligently. The result is that the ordinary Admiralty rule applies, and the damage ought to be divided between the parties.

Appeal allowed; no costs of appeal or of Court below to either party.

Solicitors for plaintiffs: *Cattarns, Jehu, & Hughes.*
Solicitor for defendants: *J. T. Davies.*

March 4.

THE LOVE BIRD. [(1880. S. No. 4253).

Damage—Merchant Shipping Act, 1873 (36 & 37 *Vict. c.* 85), *s.* 17—*Regulations for Preventing Collisions at Sea, Articles* 12, 13, 18—*Infringement of Regulations.*

A barque, provided only with a fog-horn, sounded by means of the breath, came into collision, during a fog, with a steamship. The fog-horn was duly sounded before the collision, and was heard by those on board the steamship, and those on board the steamship neglected, for some time after they heard the fog-horn, to stop or reverse the engines. The steamship was held to blame. The barque was held to be deemed in fault for not using a fog-horn, to be sounded by mechanical means, as required by Article 12 of the Regulations for Preventing Collisions at Sea, 1879.

The circumstance that the barque left port a few days before the regulations came into force was held not to afford any valid excuse for the neglect of those in charge of her to furnish her with a fog-horn, to be sounded by mechanical means, they well knowing, before she left port, that the regulations would come into force in a few days, and there being no evidence to shew that they could not have obtained a fog-horn, according to the regulations, before she left port.

THIS was an action of damage brought on behalf of the owners of the barque *Pansewitz* against the steamship *Love Bird*. The collision took place at the entrance to the Skager Rack during a thick fog on the morning of the 4th of September, 1880. The *Pansewitz*, which was on a voyage from Dieppe to the Baltic, had the wind abaft her beam; she was provided with a fog-horn, sounded by means of the breath. This fog-horn was, before the

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collision, sounded at intervals of less than two minutes three blasts in succession. The barque was not provided with a fog-horn sounded by mechanical means. She had left the port of Dieppe some days before the 1st of September, 1880. The Regulations for Preventing Collisions at Sea, 1879, came into force on the 1st of September, 1880. Before the collision those on board the barque heard the whistle of the *Love Bird*, and the barque was kept on her course. The *Love Bird* was proceeding under steam at the rate of about three knots an hour, and those on board of her, before the collision, heard the blasts from the fog-horn of the *Pansewitz*, which they judged proceeded from a vessel right ahead; the engines of the *Love Bird* were kept going ahead, and the helm of the *Love Bird* was first ported and then starboarded. The *Pansewitz* was then seen about a ship's length off the *Love Bird*, crossing her bows from port to starboard, and the engines of the *Love Bird* were then reversed full speed, and her helm kept a starboard.

Butt, Q.C., and *Myburgh*, for the plaintiffs. The *Love Bird* is to blame for neglecting to stop and reverse when she heard the fog-horn of the *Pansewitz*: *The Frankland*. (1) No blame attaches to the *Pansewitz*. She duly sounded her fog-horn which although it was not sounded by mechanical means was yet of sufficient power to be heard by the *Love Bird*, in time to enable the *Love Bird* to have avoided the collision. Moreover the *Love Bird* sailed before the Regulations came into force; she was properly equipped for her voyage according to law at the time she sailed, and she had not afterwards any opportunity of obtaining a mechanical fog-horn.

E. C. Clarkson, and *W. G. F. Phillimore*, for the defendants. The absence of a proper fog-horn, if it did not actually contribute to the collision, might possibly have done so: *The Fanny M. Carvill*. (2) The range of a fog-horn sounded by mechanical means is greater than that of a fog-horn sounded by means of the breath. Before the barque left Dieppe it was well known that the Regulations were about to come into force, and the owners of

(1) Law Rep. 4 P. C. 529.

(2) Law Rep. 4 A. & E. 417; 44 L. J. (Ad.) 34.

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the barque ought to have equipped her in accordance with those Regulations.

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE. In this case I have consulted with the Elder Brethren, and we have no doubt whatever that the steamer is to blame for this collision. There was a thick fog, and those on board the steamer heard the fog-horn of the sailing vessel according to the evidence nearly ahead, and the steamer proceeded on her course, neither stopping nor reversing her engines, which it was clearly the duty of those on board her in the circumstances to have done. She is therefore to blame for this collision.

But it remains to consider whether the sailing vessel is not also to blame. Now the Regulations for Preventing Collisions at Sea, which contain the regulations applicable to this case, came into operation on the 1st of September last, and the 12th article of these regulations is to this effect:—"A steamship shall be provided with a steam whistle, or other efficient sound signal, and an efficient fog-horn, to be sounded by a bellows or other mechanical means, and a sailing ship shall be provided with a similar fog-horn or bell." There is no dispute that the sailing vessel in this case was not provided with a fog-horn to be sounded by mechanical means. The evidence is that she left Dieppe about the 20th of August, 1880, when the Regulations for Preventing Collisions at Sea of 1879 had not yet come into operation, but that those on board her were perfectly aware that they would come into operation after she left Dieppe. It also appears that there was a copy of the Regulations on board her the last day she was at Dieppe. The defence raised in her behalf is that the Regulations did not come into force until after she had sailed from Dieppe, but there is no evidence to shew that a mechanical fog-horn could not have been got at Dieppe before she sailed, and in the judgment of the Court the fact of a vessel not having on board an efficient fog-horn to be sounded by mechanical means would be no excuse when those on board the vessel unprovided with such a fog-horn knew, as was the case here, that the Regulations would come into force whilst the vessel was at sea. I am therefore very sorry to say

that, though the decision I have come to operates severely upon the sailing vessel, I cannot decide that the present case is one that can be excluded from the operation of the 17th section of the Merchant Shipping Act, 1873, on the ground that the circumstances of the case made a departure from the 12th Regulation necessary. The section I have referred to enacts as follows: "If in any case of collision it is proved to the Court before which the case is tried, that any of the Regulations for Preventing Collisions at Sea contained in or made under the Merchant Shipping Acts has been infringed, the ship by which such Regulation has been infringed shall be deemed to be in fault unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary." There are several judicial decisions on the construction of this section, and they have decided that, if by any possibility a non-compliance with the regulations referred to could have contributed to the collision, the ship by which the Regulations have been infringed is to blame for the collision. I think that in this case the sailing vessel must be deemed in fault under the section. I am sorry I cannot come to the conclusion, nor can the Elder Brethren of the Trinity House come to the conclusion, that by no possibility could the sounding of a mechanical fog-horn, according to the 13th article of the Regulations, have prevented the collision, or that it would not possibly have given more warning to the other vessel. Therefore I am bound to say that the steamer is to blame, and that the other vessel is equally in fault. There will be no costs on either side.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendants: *J. A. & F. K. Farnfield.*

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March 5.

THE AID. (No. 417.)

Appeal from County Court—Practice—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71 *ss.* 3, 11)—*Province of Nautical Assessors.*

Nautical assessors summoned under the County Court Admiralty Jurisdiction Act, 1868, to attend at the hearing of an admiralty action tried by a County Court Judge, are present merely to advise the Judge, and the Judge ought to decide the case in accordance with his own opinion as to the law and merits of the case.

THIS was an appeal from the City of London Court.

By the decree appealed from the judge of the City of London Court ordered, inter alia, that judgment with costs should be entered for the plaintiffs in an action of damage, instituted in that court on behalf of the owners of the yacht *Lily*, against the owners of the steam-tug *Aid*.

The case was heard in the City of London Court on the 15th of December last, before the learned judge of that court, assisted by two nautical assessors. After witnesses had been examined on behalf of the plaintiffs and of the defendants, the following judgment was delivered:—

MR. COMMISSIONER KERR. In this case I regret to find that the nautical assessors and I differ in opinion. I am in an extreme difficulty, and I confess I would rather not give any judgment or any explanation. One of the nautical assessors thinks that the yacht was unmanageable, that it was not properly managed, and that it had no steerage way at all. That conclusion he has arrived at from the facts. I venture to differ from him. Dealing with the facts, however, before us, there is no doubt that, in point of law, it was the duty of the steam-tug to avoid the yacht; but the difficult question we have to decide is whether there was any inducement—what may be called an invitation to the steam-tug to keep close to the yacht, on its way down the river, so as to afford the yacht (that which I suppose every tug would be willing to do) a more rapid passage down the river in the shape of a friendly tow. It is not necessary to impute perjury to either set of witnesses; there may have been forgetfulness on both sides; but it is for me, at least, difficult to think that this steam-tug and the two barges should for several hundred yards follow this little yacht, and when overtaking it, wilfully run it down, for that is what the plaintiffs' case amounts to. I am disposed to believe that the master of the steam-tug was willing, and intended to give the yacht a friendly tow down, and that the whole thing resulted from accident. Whether it resulted from the yacht approaching too near the steam-tug, or whether it resulted from a misconception of the speed at which the steam-tug was going, or from a misconception of the time that would be required to attach a rope to the steam-tug, so as to enable it to take the yacht in tow, I do not know.

[The learned commissioner after reviewing the evidence at considerable length proceeded:]

As I have already said, I am in this difficulty. Am I to act on my own judgment, or am I to defer to the opinion of the nautical assessors, who differ from me? Probably the nautical assessors draw the correct conclusion from the nautical facts. That being so, I think I ought to defer to the opinion of the nautical assessors, and allow the judgment of the Court to be entered for the plaintiffs, but at the same time it is due to the defendants to say, that I do not concur in that judgment. I must order judgment in this case to be entered for the plaintiffs. I think the question is a mixed question of nautical conclusion and fact, and therefore I am bound to give all weight to the opinion of the nautical assessors. I am sorry to differ from them, but I unquestionably do so.

March 5. The appeal came to be heard before the judge, assisted by two of the Elder Brethren of the Trinity House.

Myburgh, for the appellants, the defendants in the Court below.

Charles Hall, for the respondents, the plaintiffs in the Court below.

SIR ROBERT PHILLIMORE. I need not trouble the counsel for the respondents. This is an appeal from a decision of the learned judge of the City of London Court in an action of collision. The collision took place between the yacht *Lily* and the steam-tug *Aid*, which was towing two barges. Both vessels were going down the river Thames, and the collision took place off Blackwall. The parts of the vessels that came into contact were the stem of the port barge with the taffrail of the *Lily*. No lives were lost, but the *Lily* sank in consequence of the collision. The first question to be decided is on which vessel was the duty of getting out of the way cast. Clearly it was the duty of the steam-tug to get out of the way of the yacht. The owners of the steam-tug do not deny this, and indeed, by their evidence, they practically admit it. But their defence is that those on board the *Lily* invited the *Aid* to give the *Lily* a friendly tow; that in consequence of this invitation in these circumstances the *Aid* kept on her course, and that the *Lily* is to blame for having brought about the collision. There is a conflict of evidence in the case. [His Lordship, after reviewing the evidence proceeded:] I put it to the Elder Brethren whether this evidence affords proof that the yacht that contributed to the collision, and, in their opinion, the yacht was in no way to

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blame. The opinion of the learned judge of the Court below was that it had been proved that there had been a friendly nvitation by those on board the yacht for a tow. In fact the learned judge of the Court below believed the story of the steam-tug, and the nautical assessors by whom he was assisted disbelieved it. The learned judge was bound to give a judgment in accordance with his own opinion, but he took an erroneous view of his duty, and ordered judgment to be entered in accordance with what was not his own opinion. It is clear that in all these cases the responsibility of the decision rests upon the judge. It may have been his duty, according to the circumstances of the case, to give more or less weight to the opinion of the nautical assessors. On questions of nautical science he would be guided by their opinion, but not contrary to his own opinion. In other cases of what might be called common evidence it is not his duty to ask the opinion of the assessors at all. He might have asked their opinion on questions within their nautical experience; but in this case it appears that the nautical assessors formed a different opinion from that formed by the learned judge himself on the whole case. This is the view I take on this part of the case, but I must remember that, apart from all the questions as to the duty of the learned judge of the Court below, and the manner in which the decision of that Court was arrived at, the main question to be decided in this appeal is whether that decision was or was not wrong either in law or in fact, and in the result, after consultation with the Elder Brethren, I have arrived at the conclusion that the decision was right though the reasoning was wrong, and therefore I must dismiss the appeal with costs.

Appeal dismissed.

Solicitors for appellants: *J. A. & H. E. Farnfield.*
Solicitors for respondents: *Prior, Bigg, Church, & Adams.*

[IN THE ARCHES COURT OF CANTERBURY.]

1880
June 5.

THE OFFICE OF THE JUDGE PROMOTED BY MARTIN *v.* MACKONOCHIE. (THIRD SUIT.)

Church Discipline Act (3 & 4 *Vict. c.* 86)—*Offences against Ritual—Disobedience to Monitions—Suit for Deprivation—Discretion of Court as to its Sentences.*

The articles, exhibited in a suit by letters of request under the Church Discipline Act, charged that the respondent, the incumbent of a parish church, had within two years of the institution of the suit whilst officiating in the performance of Divine service in his parish church, committed certain offences in matters of ritual, the same being repetitions of offences from which he had been admonished to abstain by monitions issued in previous suits, and prayed that the respondent should be deprived ab officio et beneficio.

At the time of the hearing of the suit, a decree of suspension pronounced in one of the previous suits above mentioned, and suspending the respondent ab officio et beneficio was in force and unrelaxed, but no future proceedings to enforce such sentence had been taken. The Court, though holding the articles proved, refused in its discretion to pronounce a sentence of deprivation.

THIS case came before the Court by virtue of letters of request signed by the Bishop of London in the first instance under the provisions of s. 13 of the Church Discipline Act. The letters of request contained recitals to the effect that the Rev. Alexander Heriot Mackonochie, the incumbent and perpetual curate of the new parish of St. Alban's, Holborn, in the diocese of London, was charged on the complaint of John Martin, a member of the Church of England, with having within the diocese of London within the two years then last past offended against the laws ecclesiastical, in manner following:—

1. In that the said Alexander Heriot Mackonochie having been been duly suspended by a decree of the Official Principal of the Arches Court of Canterbury from all discharge and function of his clerical offices and the execution thereof, and from receiving or taking any profits of the vicarage, or benefice of the new parish of St. Alban's, did, nevertheless, while the said suspension was in full force and effect, on divers days and times within the said two years officiate in the performance of Divine service in his said church of St. Alban's, Holborn, thereby being guilty of contumacy and contempt and against the peace of the Church. (1)

(1) For the former proceedings against Mr. Mackonochie see Law Rep. 2 A. & E. 116; Ibid. 2 P. C. 365; Ibid. 3 P. C. 52, 409; Ibid. 4 A. & E. 279; see also *Martin* v. *Mackonochie*, 3 Q. B. D. 730; 4 Q. B. D. 697.

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2. In that the said A. H. Mackonochie in his said church of St. Alban's, Holborn, on divers days and times within the said two years, did the following acts and things, that is to say:—[Here followed an enumeration of the several acts and things which were complained of as illegally done by Mr. Mackonochie] —thereby being guilty of a breach of a certain monition made under the seal of her Majesty's Court of Appeals, and served on him and also of each of two monitions made and issued to him by Sir Robert Phillimore, the late Official Principal of the Arches Court of Canterbury and by Lord Penzance, the then Official Principal of such last mentioned court respectively, and of contumacy and contempt, and thereby also as separate and substantive offences, not observing the Book of Common Prayer and contravening the laws ecclesiastical.

After these recitals, the letters of request concluded by requesting that Mr. Mackonochie might be cited to answer to certain articles, &c., and especially for having offended against the laws ecclesiastical in the matters thereinbefore specified.

Jan. 17, 1880. *Jeune* (*W. Moore* with him), on behalf of the promoter, moved the Dean of Arches (The Right Hon. Lord Penzance) ex parte, to accept the letters of request. He stated that if the letters of request were accepted the Court would be asked on the offences charged being proved against Mr. Mackonochie to deprive him ab officio et beneficio; that with regard to a former suit in this court promoted by the present promoter, in which a sentence of suspension ab officio et beneficio for three years from the 23rd of November, 1879, had been pronounced against Mr. Mackonochie for certain offences in matters of ritual which were identical in character with those referred to in the letters of request (1), the promoter had been advised that the institution of a new suit would not put an end to such former suit, but that there was no intention on the part of the promoter of taking any further step in it.

LORD PENZANCE. I understand from the present application that the existing suit is to be practically abandoned, and that the same promoter desires to commence a fresh suit against the same respondent, charging him with a repetition of the offences for which he has already been suspended from his office and benefice by the decree of this Court. This method of proceeding calls, I think, for some comment on the part of the Court, and perhaps

(1) See 3 Q. B. D. 730.

some inquiry whether letters of request for such a purpose ought to be acted upon. The case stands thus. Mr. Mackonochie has already been twice admonished in the existing suit to desist from his illegal practices, and these admonitions having been wilfully and persistently disregarded, a decree of suspension has been issued against him. This decree he has, I presume, treated with the same contempt with which he has received the previous monitions, and now, instead of coming to the Court and asking that its authority be asserted and the decree of suspension be enforced, the promoter abandons the suit altogether and seeks to commence a fresh one, the principal charge in which is that the existing decree of suspension has not been obeyed.

Where is such a system of litigation to end? Any decree that the Court may make in this fresh suit will probably meet with as much obedience and no more than that which has been paid to the existing decree, and this will lay the foundation of another suit, and so on ad infinitum.

If Mr. Martin were prepared to drop the proceedings against Mr. Mackonochie altogether there would be nothing to be said. This Court has no interest in their continuance, or concern in their pursuit. But he does not so act, he abandons one suit only to commence another, and this looks very like a frivolous use of its process, of which the Court would be bound to take notice.

The prospects of this new suit are not encouraging. If the promoter only seeks for a decree of suspension in it he will be at the termination of it precisely where he is now. I presume, therefore, and indeed the learned counsel for the promoter has said so, that the promoter seeks a decree of deprivation. Whether this Court, which in some other cases has undoubtedly the power to pronounce such a decree, has the power to do so in a case of this kind, is a question upon which I do not desire to express or intimate any opinion. But I think it is probably a question upon which opposite opinions may be held. Any such decree therefore if made may lay the foundation for fresh appeals and open the way to fresh applications to the temporal courts. But if made, and subsequently upheld, what reasonable expectation is there

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that it will secure Mr. Mackonochie's submission? No one connected with these suits wishes, I imagine, to punish Mr. Makonochie. Mr. Martin I presume desires nothing of the sort, but what he does desire is that a stop should be put to Mr. Mackonochie's illegal practices, and that the scandal involved in the constant celebration of a service, which to all outward appearance differs little if at all from the Roman Catholic mass in an English Protestant church, should be restrained by the law. In thus asking for obedience to the law, he is only requiring from Mr. Mackonochie what we all, high and low, rich and poor, gentle and simple, are accustomed in this country to render; but the course which he is now taking to obtain that end, while it insures further expense and perhaps another year or two of litigation, does not, I fear, insure success. Upon some of these considerations I might have had to inquire into the degree in which this Court is under any obligation to act upon these letters of request. But upon the whole I think that the statement of the learned counsel that the suit is instituted to obtain something more than a decree of suspension, probably a decree of deprivation, is sufficient to exonerate the promoter from the charge of making an insincere or frivolous use of the process of the Court, and the decree in the new suit may therefore be issued.

Afterwards a decree by letters of request having issued under the seal of the Court was duly served on Mr. Mackonochie, but no appearance having been entered thereto, the proctors for the promoter on the 16th of February filed the articles exhibited in the suit.

Of such of these articles as are material to the report, the first four articles, after alleging that Mr. Mackonochie (subject to the suspension referred to in a subsequent article hereinafter mentioned), was and had been for more than two years incumbent and perpetual curate of St. Alban's, Holborn, and had in fact been ordained, licensed, and admitted to the said curacy in January, 1863, contained a formal statement of the several statutes and canons he was charged with having contravened.

Of the remaining articles 5 to 9 set forth in detail the other offences charged against Mr. Mackonochie in the proceedings

taken against him in this Court and before the Judicial Committee of the Privy Council between the years 1867 and 1876, and the various decrees and monitions issued in the same proceedings, and article 10 alleged that on the 24th of March, 1878, the then Dean of Arches duly proceeding in the suit in which the monition, as issued to him by Lord Penzance, referred to in the letters of request had been issued, had pronounced that Mr. Mackonochie had failed to obey such monition in not having abstained from wearing, while officiating at the communion service, an alb, a chasuble, a stole, and a maniple; from causing to be said or sung during the performance of the Holy Communion, immediately after the prayer of consecration, and before or during the reception of the elements by the communicants, the hymn known as the "Agnus;" and from kissing while officiating during performance of Divine service, and of the communion service, the prayer or service book, and that he had continued such practices, matters, and things, and that the then Dean of Arches had admonished him to abstain for the future from such practices, matters, and things, and that a further monition in accordance with the said decree dated the 29th of March, 1878, had been duly served upon him.

Articles 11 and 12 were, so far as material, in terms as follows:—

11. The then official principal of the Arches Court of Canterbury did, on the 1st of June, 1878, pronounce that the said A. H. Mackonochie had disobeyed and contravened the monition of the Court served upon him on the 26th of July, 1875, and also the further monition served upon him on the 29th of March, 1879, and that he had been guilty of contumacy in that he did, or caused to be done, the following practices, acts, matters, and things, that is to say—[here followed an enumeration of certain practices, matters, and things identical in character with the acts, matters, and things in respect of the doing of which Mr. Mackonochie had been admonished on the 29th of March, 1879]—and that he the said A. H. Mackonochie should be suspended for the space of three years from the time of publishing the suspension for that purpose in the church of St. Alban's, Holborn, from all discharge and function of his clerical offices, and the execution thereof in the said new parish and parish church of St. Alban's, Holborn, and elsewhere within the province of Canterbury, and from receiving or taking any of the profits or benefits of the vicarage or benefice of the said new parish of St. Alban's, Holborn, or of the profits or other ecclesiastical dues, rights, and emoluments whatsoever belonging or appertaining to the said vicarage or benefice, and did suspend him, the said A. H. Mackonochie, accordingly, and did direct that the said suspension should be published and take effect from Sunday, the 23rd of November, 1879,

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and the said suspension was duly published in the new parish of St. Alban's, Holborn, on Sunday, the 23rd of November, 1879. (1)

12. The said A. H. Mackonochie, after the said suspension had been duly published as in the foregoing article stated, did not desist from officiating in his said church, but notwithstanding, and in disobedience to and violation of the said suspension so decreed and pronounced as aforesaid, did, on Sunday, the 23rd of November, 1879, and on Sunday, the 30th of November, 1879, officiate in his said church of St. Alban's, Holborn, in the performance of Divine service and in the administration of the Holy Communion, and on the 23rd of November, 1879, did refuse to allow the Reverend W. M. Sinclair to officiate in his place and stead on the said 23rd day of November in his said church, and did prevent the said W. M. Sinclair from so officiating, the said W. M. Sinclair, having as the said A. H. Mackonochie well knew, been duly appointed by the Bishop of London, and being present in the said church on the said day for such purpose, and thereby the said A. H. Mackonochie became and was guilty of contumacy and of contempt of the said Court of Arches and the jurisdiction thereof, and of incorrigibleness and obstinate disobedience to the Ordinary.

Articles 13 to 20 both inclusive charged, as substantive offences committed by Mr. Mackonochie whilst officiating during the performance of Divine service and of the communion service in the church of St. Alban's, on Sunday, the 23rd of November, 1879, and Sunday, the 30th of November, 1879, the following acts, matters, or practices: the unlawful use of lighted candles, the kneeling or prostration during the prayer of consecration in the communion service, the unlawful elevation in the communion service of the paten, bread or wafer, and of the cup; the mixing of water with the wine during the administration of the Holy Communion, and the administration of the water and wine so mixed to the communicants; the wearing of unlawful vestments known as an alb, a cope, a chasuble, an amice, a maniple, a stole, and a girdle; the saying or singing of the Agnus Dei during the communion service, before or during the reception of the elements by the communicants; the making the sign of the cross when officiating in the performance of Divine service, and of the service of the Holy Communion service, and not of the office of baptism; and the kissing the prayer or service book when so officiating.

Articles 22 and 23 were to the following effect:—

By reason of the specific offences articled in articles 13 to 21, the said A. H

(1) The suspension referred to in this article was not published until the 23rd of November, 1879, in consequence of of the pendency of the proceedings in prohibition in the case of *Martin* v. *Mackonochie*, 3 Q. B. D. 730; 4 Q. B. D. 697.

Mackonochie has offended against the laws and canons ecclesiastical, and also has disobeyed and contravened either a monition of the 20th of January, 1869, under seal of her Majesty's Court of Appeal, or of the several monitions issued out of the Court of Arches and served on him on the 26th of July, 1875, and the 29th of March, 1878, and has acted contumaciously and in contempt of the jurisdiction of the said Courts, and been guilty of incorrigibleness and of obstinate disobedience to the approved canons of the Church as also of the Ordinary.

The prayer of the articles was in substance that on due proof of the premises the Court would pronounce that Mr. Mackonochie had offended against the laws ecclesiastical in the particular matters alleged, some one or more or all of them, and that he be deprived ab officio et beneficio, or be otherwise duly and canonically punished according to the gravity of his offence, and be condemned in costs.

On the 8th of March the Dean of Arches directed that the 21st article—an article immaterial to this report—should be struck out, and that the 23rd article should be amended by striking out that part which referred to the charge made by the said 21st article, and admitted the articles so amended to proof.

April 10. The case was heard before the Dean of Arches. (1)

Mr. Mackonochie was thrice called into court, but did not appear, either in person or by counsel.

Witnesses were examined orally in court on behalf of the promoter. The registrar of the diocese of London, and secretary of the Bishop of London, proved the admission and license of Mr. Mackonochie to the vicarage of St. Alban's, Holborn, in January, 1863, and produced the form of declaration of conformity to the Thirty-nine Articles, and the three articles of the 36th canon, signed by Mr. Mackonochie. A clerk in her Majesty's Registry of Appeals in Ecclesiastical Causes produced the Act book, containing the minutes of the proceedings against Mr. Mackonochie before the Judicial Committee of the Privy Council, and the original minutes and sentences of suspension of that Court referred to in the articles.

There were also produced from the registry of this Court the minutes of the proceedings against Mr. Mackonochie in this Court, and the original monitions of the 12th of June, 1875, and the 29th

(1) The Court sat in the Library of Lambeth Palace.

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of March, 1878, before mentioned, as well as a sentence of suspension for six weeks which had been pronounced against Mr. Mackonochie on the said 12th of June, 1875, by the then Dean of Arches, for certain of the offences specified in the articles, and which suspension had been duly published.

The sentence of suspension referred to in the 11th article was not produced, and no evidence was given in support of either that or the next succeeding article, but two witnesses who had been present in the church of St. Alban's during the performance of Divine service and of the communion service on Sundays the 23rd and 30th of November, 1879, gave evidence in support of the charges contained in the 13th and subsequent articles.

Jeune, and *W. Moore*, appeared for the promoter, and prayed the Court to pronounce a sentence of deprivation, in accordance with the prayer of the articles, on the ground that the substantive charges with respect to which evidence had been given, had been proved, and that such offences had been aggravated by the previous breaches of the laws ecclesiastical of which Mr. Mackonochie had been proved guilty in the former proceedings against him.

They stated that the jurisdiction of the Court to pronounce the sentence of suspension referred to in the 11th article of the Articles had been upheld by the Court of Appeal in the case of *Martin* v. *Mackonochie* (1), but that they had not offered any evidence in support of that or the succeeding article in consequence of the circumstance that an appeal to the House of Lords in the same case had been entered, but they submitted that, apart from the charges contained in such two articles, they had proved that such persistent breaches of ecclesiastical law had been committed by the respondent, that the sentence which the Court, in accordance with authorities and decided cases, ought to pronounce in the suit, was a sentence of deprivation ab officio et beneficio: Ayliffe's Parergon, p. 208; Godolphin's Ecclesiastical Law, p. 306; *Caudrey's Case* (2); *Sanders* v. *Head* (3); *Pullen* v. *Clewer* (4); Cro. Jac. p. 37; Comyns' Digest, Visitor (C.); 2 & 3 Edw. 6, c. 1, s. 12; Canons, 38, 72; *Hebbert* v. *Purchas.* (5)

(1) 4 Q. B. D. 697.
(2) 5 Rep. 6a.
(3) 3 Curt. 603.
(4) 1 Hagg. Eccl. App. 2.
(5) Law Rep. 4 P. C. 301.

LORD PENZANCE. This suit was instituted under peculiar circumstances, and in order to make plain the reasons which have led to the conclusion at which I have arrived, it will be necessary to draw a pointed attention to those circumstances. As long ago as December, 1874, the respondent, Mr. Mackonochie, who had been previously prosecuted in this Court, had, owing to his continued infractions of the law, made it necessary that a second suit should be instituted against him. My learned predecessor, Sir Robert Phillimore, felt himself constrained in that suit to suspend Mr. Mackonochie from his office for a short period, and admonish him to refrain from his illegal practices in future. The date of this admonition was the 26th of July, 1875. Nearly three years after this—that is to say, in March, 1878—application was made to this Court, over which I then presided, to punish Mr. Mackonochie for his contempt of Sir Robert Phillimore's monition and the renewal of his ritual offences. Having regard to the fact that some little time had elapsed since the respondent had been served with that monition, and being willing, and even desirous, that an opportunity should be offered to Mr. Mackonochie to conform himself to the law, and submit himself to the monitions of the Court, if he were minded to do so, I ordered a fresh monition to be served upon him before proceeding to any measure of correction. But he in no degree altered his course. He treated this monition, as he had that of Sir Robert Phillimore, with entire contempt, and placed the Court under the necessity of passing a sentence which should have the effect of putting an end (at least for some time) to ministrations and ceremonies openly and largely at variance with the ritual of the Church of England. The Court accordingly suspended Mr. Mackonochie from his office and benefice for a period of three years. This decree led to an application to the temporal courts for a prohibition, which, though granted in the first instance by the Queen's Bench Division, was afterwards removed by the Court of Appeal. Abundant time was then allowed to expire to see if Mr. Mackonochie would appeal on this matter of prohibition to the House of Lords, and at the end of that time, upon his failing to take any step in that direction, the order of suspension was issued and served upon him. He treated this order, as it now appears, with the same

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contempt as before, and continued his ministrations unchecked. There can be little doubt that in old days, and according to all the old authorities and traditions of ecclesiastical law, his continued ministrations—ministrations too, of an illegal character—after he had been formally suspended from his office and benefice by a competent Court, constituted as grave an offence of a purely ecclesiastical character as could possibly be committed. There can be as little doubt that this open defiance of its decree did not tend to strengthen the hands or affirm the useful authority of this Court. And yet this Court is not without the power of enforcing its decrees upon proper proof of its breach or non-observance; for it has the same identical power which the highest Courts in the realm possess of so doing. But the promoter of the suit took no steps to avail himself of that power or to have that decree enforced. He failed to bring the respondent's conduct in disobeying the decree before the Court in any shape, and forbore to make any application to the Court in the matter. On the contrary, he abandoned the suit, and in answer to a question put by me, when application was made for a decree by letters of request with which to commence the present suit, his learned counsel declared that the existing suit would not be pursued, and that no further step would be taken in it. Here, then, was a solemn decree of this Court, made after the fullest deliberation, and after the fullest opportunity had been given to Mr. Mackonochie to reform his illegal practices, treated by that gentleman with contempt, and by the promoter of the suit, who had asked for it, with indifference. Such was the state of things when the present suit was instituted. Fresh offences were charged and sentence of deprivation prayed. Now, this method of proceeding raises a question upon which from the first I felt considerable doubts—doubts which further reflection has not removed. Is it competent to the promoter to deal in this way; or, rather, is it right that the Court should sanction the promoter dealing in this way with the corrective powers and authority which belong to this tribunal? He has asked and obtained at the hands of the Court a decree sufficient to put a stop to the practices of which he complains, and, having obtained it, he abandons it and asks for a fresh remedy. As I pointed out, I think, on a former occa-

sion, if the promoter chose to abandon his proceedings against Mr. Mackonochie altogether after he had obtained the decree of suspension, this Court would have had neither interest nor concern in requiring its decree to be enforced. But this is not the course he has followed. He abandons the old suit only to commence a new one, and in the new suit he passes by the decree of suspension altogether, just as if it had never existed; for I must here point out that although in the 12th article exhibited in the present suit the respondent is charged with a breach of such suspension, yet when the cause came to a hearing the learned counsel for the promoter expressly desired that no effect should be given to the charge contained in that article, and purposely avoided putting the order of suspension in evidence, and proving its service on the respondent, in order that the Court should not found its judgment in any degree upon the breach of it. The suspension of the former suit, therefore, is, in this method of proceeding, treated as a dead letter. No attempt was made to enforce it at the time, and it is not the object or effect of the present suit to enforce it, or punish its infraction now. It must be borne in mind that it was the constantly repeated disobedience of the respondent to the monitions issued by this Court and by the Judicial Committee of the Privy Council, in the course of the last ten years, which led the Court to pronounce a sentence of suspension for so long a period as three years. It is the same unvarying course of disobedience and contempt which is put forward in the present suit as a reason why the respondent should be deprived of his benefice. Whether it constitutes a sufficient reason for so doing is a question upon which I desire to say nothing. But the Court has a discretion in the passing of all such sentences, and I do not think that it would be consistent with the due maintenance of its authority that this Court should pass a solemn sentence of correction, and while that sentence is still subsisting, but wholly disregarded, pass a second sentence directed to the same end, without any allusion to the first or any attempt to enforce its observance. It is not fitting or seemly that the Court should thus pass by and ignore its own solemn decree and supersede it as nugatory by a second sentence addressed in great part to the same offences. It may very well be, however, that reasoning of this kind might

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not apply in the Court of Appeal. Whether the above considerations and the conclusion I have drawn from them are well founded as regards the action of this Court, and, even if they are, whether they should in any degree influence the course to be taken by the Judicial Committee of the Privy Council, it will be for that tribunal to determine. In these circumstances the Court must refuse to pronounce a sentence of deprivation, and any second sentence of suspension is, of course, out of the question. But it will give the promoter of this suit every facility for taking the opinion of the higher tribunal. The registrar will have the directions of the Court to draw up its judgment in such a way as to remove, if need be, any technicality which might prevent the entire matter from being brought before the Judicial Committee. And, inasmuch as the spirit in which the litigation of the last ten years has been conducted makes it more than probable that, whatever the decision of this Court might be, an appeal would have been inevitable, the promoter will arrive at his end, if that end is justified by the circumstances of the case, quite as soon as if I had now granted the decree which he asks.

Proctors for the promoter: *Moore & Currey.*

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March 8.

MORRALL *v.* MORRALL.

Deed of Separation—Maintenance—Subsequent Adultery—Further Maintenance.

A wife, by a deed of separation, agreed to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance. Subsequently having discovered that he had been guilty of incestuous adultery, she obtained a decree for dissolution of the marriage:—

Held, that notwithstanding the deed, she was entitled to the usual order for permanent maintenance.

THIS was an application for a further and fuller answer to a petition for permanent maintenance.

The petition alleged that a decree nisi had been pronounced for dissolution of the marriage, by reason of incestuous adultery, that the respondent derives an income of about 500*l.* a year from his business of a needle reducer, and that he is possessed of realized property, money at his bankers, and other sources of income.

The respondent, in his affidavit, stated that he and the petitioner had been living apart since August, 1879, and that on that day a deed of separation had been executed by which he had agreed to secure to her the sum of 30*l.* a year, and to assign to her a sum of 130*l.*, besides certain goods and chattels, and that the deed contained, amongst other covenants, the following, viz., "That the said Sarah Morrall, or any person on her behalf, shall not, nor will at any time hereafter, commence or prosecute any suit or other proceeding for compelling the said Edward Morrall to allow her any support, maintenance, or alimony whatsoever, except the yearly sum hereinbefore covenanted to be paid to her . . . and the production of these presents shall be a bar to any action or suit, or other proceeding in respect thereof."

The affidavit of the petitioner stated (amongst other things) that the income of the respondent had considerably increased since their separation, and that the incestuous adultery, by reason of which the decree nisi had been made, was not discovered by her until the 31st of January, 1880, i.e, after the execution of the deed.

Middleton, for the petitioner, in support of the application. The extent to which a wife is bound by such a deed is explained in *Williams* v. *Baily* (1); in which case the Court refused to restrain her. In *Powell* v. *Powell and Jones* (2) the wife was the guilty party. *Benyon* v. *Benyon* (3) is a direct authority for the application. *Marshall* v. *Marshall* (4) was a suit for restitution of conjugal rights. [He also cited *Besant* v. *Wood* (5) and *Brown* v. *Brown and Shelton* (6).]

Bayford, contra. The allowance under the deed was agreed to by the wife after considering what was necessary for her support, and the suit does not alter that state of things: *George* v. *George* (7) and *Weber* v. *Weber and Pyne.* (8) In *Williams* v. *Baily* (9) the wife had not accepted the deed, if she had she would have been restrained.

(1) Law Rep. 2 Eq. 731.
(2) Law Rep. 3 P. & D. 55.
(3) Law Rep. 1 P. & D. 447.
(4) Law Rep. 5 P. D. 19.
(5) Law Rep. 12 Ch. D. 605.
(6) Law Rep. 3 P. & D. 202.
(7) Law Rep. 1 P. & M. 554.
(8) 1 Sw. & Tr. 219.
(9) Law Rep. 2 Eq. 731.

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THE PRESIDENT. In this case a state of facts is proved to exist which was not in the contemplation of the parties when the agreement was executed. By that agreement the wife was to live separate from her husband by reason of differences having existed between them. It was not a licence to the husband to commit adultery, incestuous or otherwise, but merely an arrangement for living apart, and while it continued she was entitled to no more than what was stipulated for in the deed. But when she has established that her husband has been guilty of incestuous adultery, a state of things arises not in contemplation when the deed was executed, and the wife is not restrained by the deed. Circumstances now justify her in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit, and amongst them to an allowance based upon her husband's actual income.

I therefore order that the respondent file a fuller and further answer.

Solicitors for petitioner: *Surr, Gribble, & Bunton.*
Solicitor for respondent: *Rixons.*

March 15.

IN THE GOODS OF WILKINSON.

Will—Alterations—Execution.

The clause appointing executors was written partly on the second and partly on the third side of a will. Subsequently the testator altered the clause, but his signature and those of the attesting witnesses appeared opposite only to the alterations, which were made on the second side. The Court granted probate of all the alterations.

JOHN WILKINSON, late of Worksop, in the county of Nottingham, builder and farmer, deceased, made his will dated the 12th of June, 1871.

The will was written upon three sides of a sheet of paper, and the clause appointing executors was commenced in the last line of the second side, and was continued on the top of the third side. The testator subsequently altered this clause, but the alterations on the second side only were signed and attested thus:—

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TOP OF THIRD SIDE.

William Alletson
and John Torr & of Worksop,
in the county of Nottingham,
to be executors of this my will.

SECOND SIDE.

Wm. Wilkinson. I nominate and appoint ~~Chas. Marsh~~ Thos. Mallender,

Witnesses:—

Thos. Newton.
Joseph Barlow.

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IN THE GOODS OF WILKINSON.

It appeared from the affidavit of one of the attesting witnesses, that in 1874 the testator produced to the attesting witnesses his will with the obliteration and interlineation already made, and said that he had made them himself and wished to substitute William Alletson as an executor in the place of Charles Marsh. He then signed his name in the margin of the second side, and the attesting witnesses added their names.

Searle, applied for probate to William Alletson, as well as Thomas Mallender and John Torr. By the 21st section of 1 Vict. c. 26, the alteration "shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will," and those words include this case —so long as the Court is satisfied that the attestation refers to the alteration. And for this purpose parol evidence is admissible, just as it would be to shew whether the alterations were made before or after the execution. The Court will look to the obvious sequence and context. The obliteration which is unattested, forms part of the same sentence in which the attested alterations occur: *In the Goods of Kimpton.* (1)

Cur. adv. vult.

THE PRESIDENT. These alterations are made in a particular sentence, and the execution and the attestation by the witnesses are opposite to that sentence. The alterations in the sentence having been thus authenticated, I am of opinion that I may give effect to them, and I, therefore, grant probate accordingly.

Solicitors: *Williamson, Hill, & Co.*

(1) 3 Sw. & Tr. 427.

CLERKE *v.* CLERKE. 1881

Will—Feme Covert Executrix—Husband's assent to Probate—20 & 21 Vict. c. 77, s. 73. March 22.

A married woman having been appointed sole executrix of a will and universal legatee, her husband objected to her taking probate. The Court, under s. 73 of 20 & 21 Vict. c. 77, made the grant to her attorney:—

Quære, whether a husband has an absolute right to object to his wife's taking probate of a will of which she is executrix.

HANNAH NOBLE WALDEN, late of Newington, in the county of Surrey, widow, deceased, died on the 29th day of May, 1880.

The deceased made her will, dated the 20th day of May, 1880, and therein named the plaintiff, Mary Ann Clerke, universal legatee to her separate use, and appointed her sole executrix. The value of the deceased's estate was about 49*l.*, and her debts amounted to about 46*l.*

The defendant, Charles Frederick Clerke, as husband of the plaintiff, entered a caveat against proof of the will.

Powles, for the plaintiff, moved the Court to order the contentious proceedings to be discontinued, and that probate of the will might be granted notwithstanding the dissent of the husband. The parties have lived apart for seventeen years, and the husband has no interest in the property.

Searle, for the defendant. The husband fears that the plaintiff will take possession of the property and leave him to pay the debts. He insists upon his right, viz., that a wife cannot take probate against her husband's consent.

[THE PRESIDENT. It has not been the practice in the registry to require proof of the husband's consent.]

The law is clearly in favour of the husband's right to prevent her from taking the grant: *Pemberton* v. *McGill*, cited in Cootes' Practice (8th ed.) p. 51; Williams on Executors (8th ed.) pp. 236, 456, 967; *Bubbers* v. *Harby*. (1) He would be liable for her devastavit: Williams on Executors (8th ed.) 1844. [The case of *Pemberton* v. *Chapman* (2) was also cited.]

(1) 3 Curt. 50. (2) 7 E. & B. 210; S.C. Ex. Ch. E. B. & E. 1056.

5 Jur. N.S. 567

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[THE PRESIDENT. But suppose the estate were large and the husband's conduct merely vexatious, could he by his refusal deprive her of the benefits given her by the will?]

The grant might go to her nominee, who would have to give security for the due performance of his duties.

Powles, thereupon asked for the grant to her attorney under s. 73 of 20 & 21 Vict. c. 77.

THE PRESIDENT. I think that is the best solution of the difficulty. The grant may be made to the attorney of the plaintiff. She being "willing but not competent to take probate."

Solicitor for plaintiff: *H. W. Cattlin.*

Solicitors for defendant: *H. F. & E. Chester.*

March 22.

IN THE GOODS OF WILLIAM HAMMOND, DECEASED.

Administration—38 *Geo.* 3, *c.* 87, *s.* 1; 21 *&* 22 *Vict. c.* 95, *s.* 18—*Creditor*—*Administrator out of the Jurisdiction.*

An assignee in bankruptcy of an administrator who is out of the jurisdiction is a creditor within the meaning of 38 Geo. 3, c. 87, s. 1, and 21 & 22 Vict. c. 95, s. 18, and as such may obtain administration de bonis non of the intestate limited to the fund to which the assignee is entitled.

WILLIAM HAMMOND, formerly of Scott's Yard, Bush Lane, in the city of London, Esquire, deceased, died on the 2nd day of June, 1857, intestate, and a widower.

Letters of administration of his personal estate were, on the 18th day of September, 1857, granted to his son, William Parker Hammond, as his only child, sole next of kin, and only person entitled in distribution to such estate.

William P. Hammond had previously, viz., on the 9th of March, 1855, been adjudicated a bankrupt, and was at the time of his father's death indebted to his father's estate in the sum of 2250*l.*, and after having obtained the letters of administration to his father's estate, he was admitted (as such administrator) as a creditor of his own estate under the bankruptcy.

William P. Hammond, before his father's death, obtained his certificate of discharge under this first bankruptcy, and was again,

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on the 12th day of October, 1867, adjudicated a bankrupt, and Mr. Thomas Brooke was appointed creditors' assignee.

In the month of November, 1867, William P. Hammond absconded, and though numerous inquiries were instituted he has never since been heard of.

A sum of 506*l.* 5*s.* was now due to the estate of William Hammond, being a dividend payable to that estate under the second bankruptcy of William P. Hammond.

Searle, for Mr. Thomas Brooke, the assignee, moved the Court for grant of letters of administration de bonis non of William Hammond. By the statute 38 Geo. 3, c. 87, if an executor, to whom probate has been granted, is resident out of the jurisdiction, the Court may grant administration to a creditor, next of kin, or legatee, for the purpose of proceedings in Chancery, and by the statute 21 & 22 Vict. c. 95, s. 18, the provisions of the former Act are extended to all executors and administrators, whether proceedings in Chancery are intended or not. Under these Acts a grant has been made to the representative of a legatee: *In the Goods of Collier* (1); and to a trustee substituted by the Court of Chancery for an executor who had gone abroad: *In the Goods of Hampson* (2); and to a residuary legatee: *In the Goods of Ruddy* (3); and to a creditor where an executor of the executor is abroad: *In the Goods of Grant.* (4)

THE PRESIDENT. I am of opinion that a grant to the estate of William Hammond, deceased, limited to the fund in question may be made to Mr. Brooke, as a creditor in equity of the estate of the deceased.

Order accordingly.

Solicitors: *Linklater, Hackwood, Addison, & Brown.*

(1) 2 Sw. & Tr. 444.
(2) Law Rep. 1 P. & M. 1.
(3) Law Rep. 2 P. & D. 330.
(4) Law Rep. 1 P. D. 435.

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May 4.

[IN THE COURT OF APPEAL.]

THE CITY OF MECCA (1879 C. 275).

Ship—Maritime Lien—Jurisdiction—Action in rem to enforce Judgment of Foreign Tribunal of Commerce.

The plaintiffs brought an action and obtained judgment in the Tribunal of Commerce at Lisbon against the captain and owners of a British ship for damages for injury caused by a collision with the plaintiffs' ship. The Portuguese Courts recognise no distinction between actions in personam and actions in rem. The defendants' ship having come into a British Court the plaintiffs commenced an action in rem against the ship, claiming to enforce the judgment of the Portuguese Court against it, and arrested the ship:—

Held, reversing the decision of Sir R. Phillimore, that the action in the Portuguese Court was a personal action, and that the writ in the present action and all proceedings under it must be set aside, the Court having no jurisdiction to enforce a judgment in a personal action by proceedings in rem.

All civilised nations recognise the validity of maritime lien, and will enforce it when it has been declared by a foreign Court; but it is essential that it should appear from the proceedings of the foreign Court that the object of the suit was the sale of the ship, and not a personal remedy against the captain or owners.

The Bold Buccleugh (7 Moo. P. C. 267) considered.

THIS was an appeal from a decree of Sir R. Phillimore, the judge of the Admiralty Court. (1)

The action was an action in rem, instituted on behalf of W. Cotesworth and others, of Lloyd's, underwriters, and Besande & Co., of Lisbon, representatives of the ship *Insulano*, against the steamship *City of Mecca*. The indorsement of the writ was in the following terms:—

"The plaintiffs' claim is upon a judgment of the Tribunal of Commerce of Lisbon, by which the Court determined that the *City of Mecca* was alone to blame for a collision, and ordered the defendants to pay to the plaintiffs the loss sustained by them by reason of the said collision, and the plaintiffs claim 25,000*l*."

The writ having issued, the solicitors of the plaintiffs applied in the registry for a warrant to arrest the *City of Mecca*. The affidavit to lead the warrant, which is set out 5 P. D. at p. 28, stated, among other things, that "the *City of Mecca* went into

(1) 5 P. D. 28.

Lisbon, and proceedings were there instituted against the said steamship, which subsequently left Lisbon without giving security in the said proceedings."

It then stated that the owners of the *City of Mecca* appeared and that the Court determined that the *City of Mecca* was alone to blame, and ordered the defendants the owners of the ship to pay to the plaintiffs the loss sustained by reason of the collision.

The *City of Mecca* was arrested in the present action, and the defendants appeared under protest and gave bail to answer judgment.

The defendants then moved to set aside the writ, and all subsequent proceedings on the ground that the writ had been improperly issued. The judge having refused the application, the defendants appealed.

On the appeal further affidavits were filed, explaining more fully the nature and course of the action in Lisbon, and copies of the record of the proceedings were produced.

It appeared from them that in February, 1875, Besande & Co., agents for the owners of the *Insulano*, applied to the Court of first instance at Lisbon, stating that they proposed to institute proceedings against the captain and owners of the *City of Mecca*, and praying for an "embargo" on the ship, which was then in the port of Lisbon. The Court granted the embargo, the plaintiffs being put under terms to commence their action within thirty days. The ship was accordingly arrested, but the owners appealed to the Supreme Court, and the Court reversed the order on the ground that "the certainty of the debt should be proved according to the requirements of Art. 298 of the Novissima Reforma Judicial, which certainty it could not possess without its being verified by competent experts that the ship run into was unable to avoid the collision; and, moreover, because assuming the hypothesis that the vessel that ran foul of the other should be declared liable to make good the damages caused by the collision, such debt cannot be deemed to be privileged with a view to laying on the embargo provided in Art. 1311 of the said Commercial Code." The ship was accordingly released, and soon after left Lisbon.

The action was brought by the owners and underwriters of the

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Insulano before the Tribunal of Commerce at Lisbon against the captain, owners and consignees of the *City of Mecca*, and they claimed that the defendants, the captain and owners of the *City of Mecca*, might be jointly and severally condemned together with the defendants the consignees in their said capacity, to pay to the plaintiffs 31 contos, 500 milreis, with interest.

The defendants appeared and defended the action, and brought countercharges of negligence against the plaintiffs. Eventually, on the 17th of December, 1876, the judge of the Tribunal of Commerce of Lisbon gave judgment, whereby he declared "that the disposition of Article 1567 of the Commercial Code, which ordains that in the event of a collision through the fault of the captain or crew, the entire damage must be borne by the captain of the ship causing such damage, is entirely applicable, and the defendant, D. Anderson, captain of the *City of Mecca*, and the defendants, the owners of the *City of Mecca*, are bound collectively according to what is laid down in Art. 1339 of the said Code." And he therefore adjudged the action to be well founded and proved, the countercharges unfounded and not proved, and in conformity therewith he condemned the captain and owners jointly and severally to pay the amount claimed with interest, and to pay the legal penalty both in respect of the petition in the libel and the petition in the countercharges; the consignees to pay one-twentieth of the costs and the other parties the remainder.

The defendants produced affidavits by two Portuguese advocates. In the affidavit sworn by Manuel Maria da Silva Beirao, president of the Association of Advocates, he stated the effect of the Portuguese law to be as follows: "Modern Portuguese law does not accept in terms the distinction of actions in rem and in personam, because Portuguese laws deal little in doctrine. In actions for damage the following persons are answerable if the collision was originated by culpability. First, the ship herself; second, the captain of the ship; third, the owners. The ship is the special hypothec of maritime debts of collision; the Portuguese Commercial Code expressly declares it in Article 1567 and following, where the expressions are frequently found: 'The ship is responsible for all the damage occasioned.' 'The ship is under

obligation to indemnify the losses.' In this way an action in respect of damage caused by collision may be said to be in rem against the ship as to the ship causing the collision, and also in personam against the captain and owners. In actions for damage caused by collision there may be, or may not be, by Portuguese procedure, an arrest. It must, however, be noted that in every case the arrest is dependent on the proof which may be given of the facts, and if sufficient proof shall not have been given, the action is not on this account prevented. It may be prosecuted in the same way with or without arrest. The ship causing the collision is always answerable whether she be arrested or not. Where a ship is sold after the collision, it being a guarantee or special hypothec for the damage occasioned, the new owners acquire only a vessel charged with the burden of being responsible for the damage caused."

Benjamin, Q.C., and *E. S. Roscoe* (*Butt, Q.C.*, and *E. C. Clarkson, Q.C.*, with them), for the appellants. The judge in the Court below proceeded on the supposition that the proceedings in the Portuguese Court were proceedings in rem, being deceived by the terms of the affidavit on which the warrant was issued. But now that the facts are fully before the Court it is clear that, according to the practice of the Portuguese Courts, there is no such method of procedure as a proceeding in rem. The action is a purely personal one, although the plaintiffs have a right to take a separate proceeding for an embargo on the ship if they can make a case for so doing. But this the plaintiffs failed to do, and they have only their personal judgment against the owners.

But even if the judgment in the Portuguese Court was a judgment in rem, still the plaintiffs cannot enforce that judgment by proceedings in rem in the courts of this country. If they wish to proceed in rem in the English Court they must found their proceedings on the original cause of action, not on the foreign judgment.

Webster, Q.C., and *Gainsford Bruce* (*W. G. F. Phillimore*, with them) for the respondents. Proceedings in rem are the proper course for enforcing a maritime lien. A collision between two ships creates a maritime lien by international law on the ship that

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is in fault. It does not arise from the decree, although in the Portuguese Court it cannot be enforced before the decree. But as soon as the plaintiff has obtained a decree the lien becomes indelible, and it can be enforced in any Court by international law. The purchaser of the ship takes it subject to the lien, and it can be arrested wherever and in whosoever hands it may be: *The Bold Buccleugh.* (1) The form of the action in the foreign Court can make no difference. The modern Portuguese law does not adopt the distinction between actions in personam and actions in rem; but if the object of the action is to attach the ship it is in fact an action in rem, although it may not be called so: *Castrique* v. *Imrie* (2); *The Europa.* (3)

JESSEL, M.R. This is in form an appeal from a decision of Sir Robert Phillimore; but it is not so in fact, because the facts that are before us are totally different from the facts which were before him. He decided that there had been a judgment in rem by the Portuguese Court having jurisdiction in Admiralty; that an action brought on that judgment in the High Court might be brought as an action in rem, that is, as an action against the ship, and might be enforced in the way in which process in this action was enforced—by an arrest of the vessel. The owners have appeared under protest and asked to set aside all those proceedings, and he decided against them on that ground. It is hardly necessary to read his judgment, but I think it is only fair, arriving as I do at a different conclusion on the present facts, to read this to shew that that is what he really said. He said, "The Court is now called upon to be an aidant to the enforcement of a judgment in rem, given by the Portuguese Court," and then he said that although there is no direct precedent on the point, "it is clearly for the interests of justice that this Court should exercise the jurisdiction as prayed, and having its hand upon the res should not take it off until the sentence be executed." That is the foundation of his judgment. It appears that the real facts of the case were not before him at all. There was an important affidavit by a clerk to the solicitors. I am far from saying that it

(1) 7 Moo. P. C. C. 267. (2) Law Rep. 4 H. L. 414, 447.
(3) Br. & Lush. 89.

was purposely erroneous, but it did lead to an erroneous conclusion in the mind of the learned judge, and it probably would have led to an erroneous conclusion every one else.

It now appears that by the law of Portugal there is no such thing as an action in rem—it does not exist at all. What the reason may be is immaterial to inquire, and the reason given is certainly a very odd one, but the fact is quite plain. This is what is said by a gentleman of great eminence in Portugal—a Portuguese advocate and president of the Association of Advocates in Lisbon, and he has practised as an advocate since 1840, and he says, "That modern Portuguese law does not accept in terms the distinction of actions in rem and in personam, because Portuguese laws deal little in doctrine." Whether that reason is satisfactory to his mind or not, I do not know. I am afraid it is not satisfactory to mine. That being so, the course of procedure seems to be this: They bring a personal action against the owners and the captain who are liable for the collision, and when they have got judgment in that action, if the owners and captain do not pay, and if the vessel after the judgment comes within the jurisdiction of the Portuguese Court, they enforce their personal judgment as against the vessel under the doctrine of the law of nations, which is stated by the two advocates who have made affidavits to be part of the law of Portugal, that damage arising from collision gives a maritime lien on the vessel which is in fault, and that the lien dates from the time of collision, and of course is not created by the judgment, which merely ascertains the amount of the damage and also decides, if that is disputed, whether there is any lien at all, whether there is any fault or liability on the part of the vessel. That being so, the judgment in this case was given actually against the captain and owners by name and there is no other judgment, and the present action is brought on that judgment and on that judgment only. There was in reality in Portugal an attempt to seize the vessel by arrest, which attempt failed, because, as I have already said, the Portuguese law does not allow the arrest of a vessel before the damage is ascertained, and therefore the embargo, as it is called, was discharged and there was no arrest of the vessel, nor does it appear that it has since come within the jurisdiction of the Court

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of Portugal, nor is there any maritime lien or order directing a charge on the vessel or directing the sale of the vessel.

It appears to us clear that this judgment is a personal judgment in a personal action. Then it may be said what is there to argue? The argument presented to us by the respondents is this—First of all it is alleged that the action in Portugal was an action for enforcing a maritime lien; secondly, that whatever the terms of the judgment might be, it was a judgment for enforcing a maritime lien and a judgment in rem, and that being so, it was a judgment binding the vessel in the courts of every civilized country under the international law. But I find the simple answer is that it is not an action or proceeding to enforce a maritime lien—nothing of the kind appears on the proceedings. There is no suggestion from beginning to end that the ship is liable; there is no declaration that the ship is liable, and it does not appear on the proceedings that the ship was even within the jurisdiction at the time the action was commenced against the owners. An action for enforcing a maritime lien may no doubt be commenced without an actual arrest of the ship, but there is no suggestion that they intended anything of the kind, and, in fact, the law does not allow it. An action against a ship, as it is called, is not allowed by the law of Portugal. You may in England and in most countries proceed against the ship. The writ may be issued against the owner of such a ship, and the owner may never appear, and you get your judgment against the ship without a single person being named from beginning to end. That is an action in rem, and it is perfectly well understood that the judgment is against the ship. In the present case the judgment does not affect the ship at all, unless the ship should afterwards come within the jurisdiction of the Portuguese Court, and then it can be made a proceeding by which you can afterwards arrest the ship and get it condemned. Therefore, it seems to me to be plain that this is a personal action as distinguished from an action in rem, and it is nothing more or less; and any attempt to make it out something else (because the law of Portugal does not allow actions in rem) is really to change the real nature of the action to meet the exigencies of those who want to make the udgment of the Court of Portugal go further than it really does.

It appears to me, therefore, we have not now the same state of circumstances as that on which the judge in the Court below decided, for there was no action in rem, or judgment in rem, either in form or substance.

Reference has been made to the case of *The Bold Buccleugh* (1), from which I will read a few words of the judgment delivered by Sir John Jervis. At page 284 he says: "Having its origin in this rule of the civil law a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process, and Mr. Justice Story (2) explains that process to be a proceeding in rem, and adds that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only competent Court to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches, and whilst it must be admitted that where such a lien exists a proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding in rem is the proper course, there a maritime lien exists which gives a privilege or claim upon the thing to be carried into effect by legal process."

Then he refers to what occurred in that case, and adds that an action was brought in Scotland against the owners by name—very much like the action in the foreign court below here; but there is something in addition, because when it comes within the jurisdiction they arrest the vessel to secure the debt, and then this applies exactly to this case, "the arrest by the steamer was only collateral to secure the debt." They did not get so far in Portugal. They tried but failed. Then he says: "We have already explained that in our judgment a proceeding in rem differs from one in personam, and it follows that the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other." That is the formal proceedings in Scotland were against the person, although the vessel was arrested as security for the debt. It is really the form of the proceedings which must be looked at to ascertain whether it is a proceeding in rem or personam, and it lends much greater force

(1) 7 Moo. P. C. C. 269. (2) 1 Sumner, 78.

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in the case before us when the attempt to arrest the vessel failed altogether. For this reason it seems to me we should go further than we should be warranted by any principle in going if we said that the judgment was not a personal judgment, and that the Court was entitled to order the arrest of the vessel as if it were an action in rem and a judgment in rem. Therefore I consider this appeal ought to be allowed.

BAGGALLAY, L.J. I am of the same opinion. In the early part of January, 1875, a collision took place off the Portuguese coast between the British ship *City of Mecca* and a Portuguese ship called the *Isulano*, on which an action was brought in the Portuguese Court. Subsequently, in the year 1879, an action was brought in the Admiralty Court in England, on which this present appeal has been commenced and when the writ was issued it was indorsed as a claim upon a judgment of the Tribunal of Commerce of Lisbon, and the plaintiffs claimed 25,000*l*. That judgment of the Tribunal of Commerce at Lisbon was a judgment pronounced on the 17th of December, 1876, which condemned the defendants the owners of the *City of Mecca* jointly and severally to pay to the plaintiffs the amount claimed with interest. It was an action brought by the owners of the *Insulano* and also by the underwriters who paid certain claims under policies upon the ship, therefore it seems to me impossible to say, looking at the form of the judgment itself, that it was any more than a personal action—a judgment against the defendants personally for the payment of a specific sum of money. But before this writ was issued, an application was made to the judge of the Probate Division for liberty to issue the writ and to proceed to arrest the ship, and an affidavit was then made which I am willing to accept was made in ignorance of the true state of the case, alleging that the action commenced in the Portuguese Courts had been proceedings in rem as far as regards the ship. The defendants never seemed to be aware that this was not the case until after the matter had been disposed of by the judge of the Probate Division, when an application was made to him to set aside the writ. He proceeded, as I read his judgment—entirely on the footing that the proceedings in Portugal had been proceedings in rem.

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For reasons that have been assigned by the Master of the Rolls, which it is unnecessary for me to repeat, it appears to me that there is no question but that the proceedings in the Tribunal of Commerce in Portugal were entirely personal proceedings—proceedings in personam. No doubt proceedings of a different character were commenced in the Civil Tribunal of Portugal—those proceedings preceded the judgment of the Tribunal of Commerce. In the first instance in the Civil Tribunal an embargo was obtained by the plaintiffs in the present action to arrest the ship, and the ship was only released by giving security. But those proceedings were made the subject of an appeal in the Supreme Court of Lisbon, and ultimately the decision of the Court of first instance was reversed, and on the two grounds to which reference has already been made, the one that it was not within the ordinary jurisdiction of the Tribunal of Commerce to grant an embargo, unless it were established that the ship was to blame, so far differing from proceedings in the English Court of Admiralty, in which, where the matter is in doubt, the ship may be arrested and security given if it is allowed to go, but in Portugal it is not the law while there is a doubt. That was one ground. The second ground for discharging the embargo, I must confess, appears to be one more difficult to understand. Whatever might be the effect of that particular reason which can be only well understood by an examination of the particular article of the Code to which reference has been made; one thing is clear, that there were proceedings that could have been taken in the Civil Tribunal in Lisbon, by which the arrest of the ship could be obtained, and this would be a proceeding in rem according to my view. The attempt was made but failed, as it could not be done except after proof that the *City of Mecca* was alone to blame, and it was not renewed probably for the good reason that the ship was no longer within the jurisdiction, and it would therefore have been useless. I am at a loss to understand on what grounds, now that we have got these facts which were not before Sir Robert Phillimore, it could be held otherwise than that the proceeding was in personam and was not a proceeding in rem.

One argument I do not desire to pass over which was addressed to us by Mr. Gainsford Bruce—it was a bold one. It was this—

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that on an action on a foreign judgment the English Court of Admiralty will proceed in rem whenever the foreign tribunal has established a maritime lien. Mr. Bruce was unable to produce any authority, nor do I think any can be found for the proposition he advanced.

It appears to me that the present proceedings were initiated under a mistake, and that the appeal should be allowed.

LUSH, J. The question which we have to decide apart from all technicality is whether the arrest of the vessel in the proceedings out of the Court of Admiralty was a wrongful arrest. That depends, I think, on whether the proceedings in the Court of Portugal were proceedings in rem. It is part of the law of nations that Courts of Admiralty in different countries have the power to condemn vessels and order them to be sold for the satisfaction of a maritime lien. Maritime liens are recognised by all civilized nations, and damage by collision is classed among those things which create a maritime lien; and had this been a judgment in rem, that is to say a judgment condemning the ship and ordering the ship to be sold in order to satisfy the maritime lien, that judgment would have been recognised in this country and every other civilized country. But it is most important that proceedings under which the sale of another vessel takes place should shew on the face of them the authority why that property is to be diverted from the owner; because the purchaser's title is recognised by all nations, and the title depends on the circumstances under which the sale takes place. Therefore it is important that the judgment should shew on the face of it that the proceedings against the vessel are not merely against the owners as such, or the captain, but that the proceedings had in contemplation the ultimate sale of the ship and a judgment ordering the ship to be sold; and if this does not appear on the face of the proceedings then the title of the purchaser has nothing to support it. It is not a mere matter of form but a matter of substance that the decree under which the sale is attempted to be justified should be shewn on the face of the proceedings.

Now, upon the face of this judgment, there is not a word about a claim against the ship from beginning to end. It is well known

that the owner of a vessel that has suffered by collision with another has two remedies. He may bring an action against the captain or owner of the other vessel and recover damages, or he may sue in the Court of Admiralty and make the ship pay. It has been stated before us that the Court of Admiralty has been abolished in Portugal and the jurisdiction is transferred to a Court of Commerce, and that there is no power now in that country to institute what are called actions in rem. That is what I collect from these proceedings. Whether there is or is not, seems to me immaterial. There certainly is a proceeding by which a vessel can be laid under embargo, that is arrested, if an action is brought against the captain, in order to secure payment, by lien perhaps, of ultimate damages; but whether that can be carried out to proceedings in rem I do not know, nor does it strike me to be material. But what is material in considering an action of the nature claiming damages alone is that there is nothing about the ship from the beginning to the end, as I have said. According to the practice in Continental Courts in judgments the article of the Code upon which the Court founds its judgment is there set out, and this article, which is a prominent one, on which the judgment of the Court is based, says: it is article of Commercial Code, 1567, "In the event of a vessel being run into by another through the fault of the captain or of the men composing his crew, the entire damage occasioned to the collided vessel and her cargo must be borne by the captain of the ship which causes it," and further on the Court says, "consequently the disposition of Art. 1567 of the Commercial Code, which ordains that in the event of a collision through the fault of the captain or crew the entire damage must be borne by the captain of the ship causing such damage," is entirely applicable, and the defendant David Anderson, the captain of the *City of Mecca*, as the defendants, the owners of the *City of Mecca*, are bound collectively according to what is laid down in Art. 1339 of the said Code." The action being brought against the captain and owners it is also brought against the consignees, and the Court gives some special judgment in reference to the consignees which I need not read, and they quote the two articles giving judgment against the captain and giving judgment against the owners of

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the vessel. Then the judgment proceeds, and the judge says: "I adjudge the said action to be well-founded and proved, the counter-charges unfounded and not proved, and in conformity thereunto I condemn the defendant, David Anderson, and George Smith, and owners, jointly and severally to pay to the plaintiffs the amount claimed with interest, and I do also condemn them to pay the legal penalty both in respect of the petition in the libel and of the petition in the counter-charges," and so on. There is not a word about condemning the ship, nor do I see how they could condemn the ship. The ship had been improperly arrested in the first instance, because it was found by the Supreme Court that the plaintiff in the action had not performed the conditions by which alone an embargo could be laid on the vessel, that is to say, it was not proved to the satisfaction of the Court that the fault of the collision was entirely due to the *City of Mecca*, and therefore the Court discharged the vessel from the arrest, and the vessel went away. I do not see how it was possible for them to carry and execute a maritime lien when they had not possession of the thing. The vessel was out of their jurisdiction, it was an English vessel, and it naturally left the Portuguese coast; and under the decree of that Court, if a purchaser had to prove his title he could not quote a single word of this judgment or any judgment at all that would justify a sale of that ship. It is a judgment purporting to be a judgment against the persons of the captain and owners, and if they ever find them within their jurisdiction they may execute according to the process they have at their command the judgment against them individually. But as to any judgment against the ship, I doubt if the ship were found there now that they could seize it. But even if they found the ship there, and they could without further process seize the ship and sell it in satisfaction, that would not make this a judgment in rem which any Court in this country could be called on to execute.

For these reasons therefore, I am of opinion that the action is entirely unjustified, and inasmuch as it is not merely a question of the issuing of the writ, but the vessel has been arrested, and therefore the owners of the vessel were deprived by it of the right of having full command of the vessel, I think we are well

warranted in coming to the unanimous conclusion that the proceedings must be set aside, and in not waiting for the further development of the matter by fresh litigation.

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BAGGALLAY, L.J. I think I ought to express my entire adoption of the definition of proceedings in rem and in personam, as quoted by the Master of the Rolls in the case of *The Bold Buccleugh* (1), but I think there is one additional passage that should be read, viz., "This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached."

Appeal allowed.

Solicitors for appellants: *Gellatly, Son, & Warton.*
Solicitors for respondents: *Pritchard & Sons.*

M. W.

[IN THE COURT OF APPEAL.]

July 19.

ROBERTSON *v.* ROBERTSON.

Practice—Wife's Costs—Limit.

In a divorce suit, the costs of the wife payable by the husband are not limited to the amount paid into court or secured by the husband for that purpose.

Order of the Divorce Court varied.

APPEAL by Mrs. Robertson, the respondent, from a judgment of the Divorce Court.

The petition was by Russell B. Robertson for a divorce from his wife, Annie Robertson, on the ground of her adultery. It was heard before Sir J. Hannen, the President of the Court, without a jury; and witnesses on both sides were examined on the hearing.

The President delivered judgment, stating that he believed the witnesses for the petitioner and not those for the defence; and he pronounced that the petitioner had sufficiently proved

(1) 7 Moo. P. C. 267, 284.

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the contents of the petition, and decreed that the marriage between Russell B. Robertson and Annie Robertson, then Carruthers, spinster, be dissolved, by reason that since the celebration thereof the respondent had been guilty of adultery, unless sufficient cause be shewn to the Court why this decree should not be made absolute within six months from the making thereof; and condemned Oscar Favagrossa, the co-respondent, in the costs incurred and to be incurred on behalf of the said petitioner in the cause; and ordered that the costs incurred therein by the respondent be paid, but not exceeding the amount paid into Court or secured by the petitioner for that purpose.

Mr. Robertson had given security to the amount of 370*l.*, and had paid that sum for the costs of Mrs. Robertson, but her costs had been taxed at 680*l.*

Mrs. Robertson, in person, contended, first, that the adultery had not been proved; and, secondly, that her costs to be paid by her husband ought not to be limited by the amount for which security had been given.

Inderwick, Q.C., and *C. A. Middleton*, for Mr. Robertson. The judge has a discretion as to costs, and he has only given Mrs. Robertson a part of her costs. The Court of Appeal will not interfere in a case of discretion. The rule of the Court has always been to limit the costs in this way: *Flower* v. *Flower* (1), and if the solicitors of Mrs. Robertson thought they were entitled to more they should have applied to have security for more. The defence has failed, and must therefore be taken to have been false, and why is the petitioner to pay the costs of a false defence. These are not costs as between party and party, but as between solicitor and client, so that the petitioner will have to pay for any number of useless witnesses who may have been called.

Mrs. Robertson, in reply.

JESSEL, M.R., said that two questions had been raised on this appeal. The first was of great importance, whether the judgment pronouncing the respondent guilty of adultery was right; the

(1) Law Rep. 3 P. & D. 132.

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second was whether the costs of the appellant payable by the petitioner were not to exceed the amount for which he had given security. As to the first point, it was a fixed rule that when the judge in the Court below had heard the witnesses, and had come to a conclusion on their evidence, the Court of Appeal only interfered in very peculiar cases. On this point the appeal failed. His Lordship then proceeded:—

With regard to the question of costs I have come to a different conclusion. The practice seems to be to require the husband either to deposit a sum of money or to give security for a sum of money to cover the wife's costs, and that sum may be increased from time to time by application to the Court. It seems also to be the practice that where the wife fails and costs are awarded to her, or, rather, to her solicitor—for he it is who gets the costs—the costs properly incurred are not ordered to be paid, but only the costs properly incurred not exceeding the sum paid into court or secured by the petitioner. I must say in fairness to Sir James Hannen that this practice, as we are informed by the learned registrar in court, did not begin with him, and that he merely followed the practice of his immediate predecessor, who followed the practice of Sir Cresswell Cresswell. But the practice of the old Ecclesiastical Court, of which Court the Probate Court may be considered to be the legitimate successor, was quite different. There the rule was to tax and pay the whole of the wife's costs before the hearing, and the amount was not limited in any way to any sum which was secured or paid into court by the husband. The reason why that practice was not followed when the Probate Court was instituted is curious. Under the old system, as the evidence was all in writing, and complete before the hearing, there was no difficulty in taxing the whole costs; but with the new Divorce Court the practice of oral evidence was introduced, and then the costs could not be taxed beforehand. No one could know how many witnesses would be called, or how many summoned, or what time their evidence would take, or what would be required for their maintenance or for their journeys or expenses; and therefore it became impossible to follow the old practice of the Ecclesiastical Court. Then in the Divorce Court, as they could not tax and pay the

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costs before the hearing, there arose a practice of making the husband pay into court or secure a sufficient sum; and then, following a false analogy, when the wife's costs were taxed they were limited to that sum.

Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate; so that in the absence of a settlement (which, as we all know, is a comparatively modern introduction) she was absolutely penniless, and, therefore, the Ecclesiastical Court not only provided for the costs of her defence, but also gave her alimony pendente lite so as to provide for her maintenance. Of course the husband may say "it is a hardship on me to have to pay the costs of my wife's false defence to a charge of adultery, or the costs of a false counter-charge against myself of adultery or cruelty." No doubt it is a hardship, but what would the wife have to say in answer? Suppose the wife had brought him a sum of 10,000*l.*, or 20,000*l.*, or 50,000*l.*, would not she have a right to say "You have taken all my property from me, and am I to be left defenceless and not able to meet your false charge of adultery?" Of course it is manifest that there must be money provided for the wife to defend herself, and who is to take up the defence? Only a solicitor, who must look for payment, not to the wife, who has nothing, but to the husband; and therefore it was quite right to secure him that payment by getting money paid into court, and finally by payment of the proper costs incurred when the suit was heard.

Now, as was observed by the learned judge in the case of *Flower* v. *Flower* (1), it is not the solicitor's fault if the wife is wrong. If he himself conducts the litigation properly, if he fairly investigates the charges and sees a reasonable foundation for a defence, he is not to lose his costs and the fair remuneration for his labour, because he is not successful. No solicitor would engage in the practice of the profession on the terms of not getting paid whenever he was unsuccessful; and, therefore, unless he himself

(1) Law Rep. 3 P. & D. 132.

has been guilty of misconduct, there is no reason for depriving him of his costs. It appears to me, therefore, that where the defence is fairly and reasonably conducted, the solicitor ought to be paid in full his costs, that is, his costs properly incurred.

When we come to consider what has been done in this case, I think there is no ground whatever for saying that we are not at liberty to rescind the decision of the learned judge. He did not exercise any discretion at all, he simply made the usual order as to costs, an order which had become usual in the way I have mentioned. Therefore it is not a case where the appeal is as to the exercise of discretion, but a case where the judge, conceiving himself bound by a rule of practice, which we think erroneous, simply followed that rule. The 159th rule is plain. "When on the hearing or trial of a cause, the decision of the judge ordinary or the verdict of a jury is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for and ordered to be allowed by the judge ordinary at the time of such hearing or trial." That of course means ordered to be allowed in the exercise of a judicial discretion; and it appears to me that there not being a suggestion that the solicitor of the wife has conducted himself otherwise than properly, or that he had not fair grounds for believing that the wife had a defence against the charge of adultery, he ought to be allowed the usual costs.

I have given what I believe to be the true view of the origin of the liability of the husband; but I am not oblivious to the nobler view, if I may so express it, held in the House of Lords, that no gentleman, indeed, no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery. Really, if there had not been, as I do believe there is, the common and pecuniary reason for fixing the husband with the costs, I think that that reason ought to be sufficient to all right-minded men.

The result, therefore, will be that as the appellant succeeds in one portion of her appeal, and fails in the other portion of her appeal, there will be no costs of the appeal, but the order of the Court below will be amended by striking out the limitation of costs to the amount paid into court.

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BRETT, L.J., said, that it had been frequently laid down, that where in the Court of first instance, witnesses on both sides had been examined vivâ voce before the judge, the Court of Appeal would not interfere with the judgment of the learned judge upon matters of fact, unless the Court of Appeal could see very clearly that the decision was wrong. This case was within the rule, and all the Court had to say was that they could not see that the judge in the Court below was wrong. His Lordship then proceeded:—

With regard to the question of costs, I confess that I feel very great diffidence. The rule has been laid down and acted on by three judges—Sir Cresswell Cresswell, Lord Penzance, and Sir James Hannen, and I feel the utmost diffidence in disagreeing with such an old practice followed by such judges; but still I do think with regard to Lord Penzance and Sir James Hannen that it would have been very difficult for them to break through a rule of practice which had been laid down by their predecessor, Sir Cresswell Cresswell. And whatever diffidence one may feel, this is a Court of Appeal, and we are bound to act on the opinion which we ourselves form, whether that be right or wrong.

Now it has been argued, that it is unjust as against the husband that, where the wife entirely fails in her allegations against him, he should be made to pay the costs. I will not repeat what my Lord has said, but to my mind, the reasons that he has given are conclusive to shew that it is not unjust, but, on the contrary, it is a question of high policy and high propriety, and there is no foundation for saying that it is unjust as against the husband that he should pay the costs of his wife's defence, whether that defence be finally made out or not. I entirely agree that no high-minded husband would grudge the expense of enabling the wife to defend herself against such a charge as this, or in any dispute which might unfortunately arise between them. The fact of his being her husband ought to make him liable; and there are other reasons which my Lord has given which seem to me to explain this rule. Therefore there is no injustice.

Now, when we learn how this matter has been dealt with in the Divorce Court, we see how the practice originated. It originated in an inaccurate following of the rule in the old Ecclesias-

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tical Court where all the expenses of the litigation were known and could be taxed before the hearing, and were therefore paid regardless of the result. If the old rule of the Ecclesiastical Court was followed, all the right and justifiable expenses ought still to be paid by the husband; the only difference being that though the amount cannot be ascertained till after the hearing, it ought to be ascertained with equal disregard of the result of the litigation. I come to the conclusion that that is the right rule; and, moreover, the only rule consistent with the old rule of the Court, namely, that discretion should be exercised in each particular case. The mode of exercising that discretion seems to me to be the one which is glanced at in *Flower* v. *Flower*. (1) If the solicitor who appears for the wife either knowingly promotes a case which it must be clear to anybody has no foundation at all, so that he is countenancing improper litigation; or if he takes steps which are merely oppressive or obviously unnecessary; or if he crowds a case with absurd evidence, all those are reasons why, if he so misconducts himself, the costs of the wife should be disallowed either in whole or in part. But to say that as a rigid rule of practice he is only to be allowed on behalf of the wife the costs estimated before the trial, which estimate by admission is an erroneous estimate, seems to me to be wrong; and I believe that no one would be more happy to hear that the practice which has hitherto prevailed in the Divorce Court on this subject is now overruled by us, who have the power to overrule it, than the present President of the Court.

COTTON, L.J., after stating that he felt bound to decide against the appeal on the question of fact depending upon the credibility of the witnesses, proceeded:—

On the question of costs, in my opinion this order cannot stand. It is unnecessary to go into the question whether it is just or not that the husband should provide for the costs of the wife. That was the old established rule in the Ecclesiastical Court; it was the practice of the House of Lords when bills were introduced for divorce, and it was founded on this. When the wife has to take proceedings against her husband, or he against her—all her pro-

(1) Law Rep. 3 P. & D. 132.

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Cotton, L.J.

perty being in him—she ought to be provided at his expense with the means of bringing her case before the Court or of properly defending the case brought against her; and whether she is successful or not, in my opinion the rule is to this effect, that the costs properly incurred in bringing her suit before the Court, or in defending the attack made on her, ought to be paid by her husband. Now the order here does not say that these costs had been improperly incurred, but it gives the wife, or rather the solicitor employed by her, the costs of the defence, limited not to the amount at which they shall be ascertained by taxation but to the amount which has been paid into court, or which has been secured in consequence of some one, who could only guess, fixing a sum which probably would be sufficient to pay all costs properly incurred. In my opinion that is quite wrong; and when one looks at the 159th rule, that in my opinion points to something rather different. It gives the judge a discretion in this way; that where there are certain steps taken improperly by those who are acting on behalf of the wife—witnesses called who ought not to have been called, and so on—those are costs which in his discretion he may disallow. But, in my opinion, it is not a proper thing under that order to say, "although I do not consider in my discretion that certain issues ought not to have been raised, or that certain witnesses ought not to have been called, I limit the amount of the wife's costs to the estimate made before the amount was known." That, in my opinion, is not a proper reading of this 159th rule, and, as we can do it, the practice which has hitherto prevailed must be considered as one which is no longer to be followed.

Appeal as to costs allowed.

Solicitors for Mr. Robertson: *Waddilove & Nutt.*

C. M.

[IN THE COURT OF APPEAL.]

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July 20.

PREHN *v.* BAILEY.

THE ETTRICK. (1880. E. 0186.)

Limitation of Liability—Shipowner—Wrong-doer—Salvage—Cargo—Thames Conservancy—Powers under Two Acts of Parliament.

The payment into court of 8*l.* a ton under 25 & 26 Vict. c. 63, s. 54, does not place the shipowner in the position of a person who has not done wrong.

The owner of a ship sunk by a collision in the Thames admitted it to be his fault, and paid into court 8*l.* a ton in a suit to limit his liability. The Thames Conservators, having powers under the Removal of Wrecks Act, 1877, and the Thames Conservancy Acts, raised the ship and delivered the ship and cargo to the owner, he undertaking to pay the expenses of raising. Part of the cargo was some wool, which was damaged by being sunk:—

Held, that the shipowner was bound to deliver the wool to the owner of the wool without claiming from him, by way of contribution to salvage, any part of the expenses of raising the ship and cargo.

Where a public body has powers under two Acts, it must be taken to have proceeded under that which gave it most advantages.

SPECIAL CASE.

W. Prehn, the plaintiff, was owner of the steamship *Ettrick*, on board of which were 293 bales of wool belonging to one Dr. Wendt, put on board by him in London, for delivery at Gravelines. A collision took place in Gravesend Reach, between the *Ettrick* and another ship, by which the *Ettrick* was sunk. In May, 1880, the plaintiff commenced an action to limit his liability, in which action he admitted that the collision was caused by the bad navigation of the *Ettrick*. The usual judgment was pronounced, and the plaintiff paid into court the sum of 1972*l.* as 8*l.* a ton. Inquiries were directed to ascertain the persons entitled to claim upon that sum, and Dr. Wendt claimed in respect of the 293 bales of wool. In March, 1880, the Conservators of the Thames, acting under the powers vested in them by statute, had raised the *Ettrick*, with her cargo. The expense of raising was 400*l.*, and the value of the *Ettrick* when raised was 1100*l.* The expenses of raising were not enhanced by any expenses specially incurred for raising the bales of wool. Upon an undertaking given by the plaintiff to pay the costs of raising, the *Ettrick* and her cargo were handed

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over to him. Dr. Wendt then applied to the plaintiff for the bales of wool, which were given up to him, he by letter dated 27th March, 1880, undertaking to pay the freight as if the cargo had been delivered at Gravelines, and all general average or other charges that might legally fall on the wool. The plaintiff then claimed from Dr. Wendt 124*l.* 15*s.* 2*d.*, as due for general average, salvage, or otherwise; or to fall on the said wool. A special case was thereupon stated for the opinion of the Court, the material contents of which are above given; the first question being "Whether under the circumstances above set forth the plaintiff is entitled to the said sum of 124*l.* 15*s.* 2*d.*, or to any and what sum by way of general average, contribution, salvage, or otherwise. 2. Whether the plaintiff is entitled to prove against the said fund in court, as aforesaid, in respect of such sum, or any part thereof, or otherwise, in respect of the matters aforesaid. 3. Whether the plaintiff is entitled to be paid the said sum, or any and what sum, by the said Dr. Wendt personally."

The case was argued before Sir R. J. Phillimore, Judge of the Admiralty Court, on 30th March, 1881.

Phillimore, for the plaintiff, abandoned the claim on the fund in court, and claimed only against Dr. Wendt and the wool. The arguments so far as relate to the points reported were the same as those used in the Court of Appeal.

Myburgh, for Dr. Wendt.

April 5, 1881. SIR R. J. PHILLIMORE, after stating the facts of the case:—It was contended, on behalf of the owner of the *Ettrick*, first, that although, apart from the statutory limitation of his liability, he would have been liable to pay this 124*l.* 15*s.* 2*d.*, yet having paid once into court this 8*l.* per ton he is entirely purged of his liability as a wrong-doer and stands in the position of an innocent party, and that to hold him now liable for this 124*l.* 15*s.* 2*d.* would be to make him liable by that sum in excess of the statutory limitation. In support of this position the case of *Chapman* v. *Royal Netherlands Steam Navigation Co.* (1) was cited. It was contended, in the second place, that the

(1) 4 P. D. 157.

owner of the *Ettrick*, having a right to be treated as an innocent party, was entitled to claim from Dr. Wendt the sum in dispute as a general average contribution, to defray the expenses of salvage service rendered by a third person, that is to say, by the Thames Conservancy. On behalf of Dr. Wendt it was contended that the case did not turn upon the effect of the statutory limitation of liability. The owner of the *Ettrick* contracted to take the wool to Gravelines, but by the fault of his servants, it was sent with the ship to the bottom of Gravesend Reach, and it became the duty of the owner to raise the vessel, the expenses of doing which, it is admitted, were not enhanced by raising also the bales of wool. This duty was imposed upon the owner either by the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), or by the Removal of Wrecks Act, 1877 (40 & 41 Vict. c. 16), or by both. It was contended that if the Conservancy authorities had, as it was competent for them to have done, sold the ship, it would have produced ample funds to defray the cost of raising, and there would have been no charge on Dr. Wendt's cargo. I must here observe that the 6th section of the Removal of Wrecks Act seems to prescribe that the proceeds of sale arising from ship and cargo shall be regarded as common fund. As a matter of fact, however, the ship and cargo having been delivered up by the Thames Conservancy to the plaintiff, the 6th section never came into operation. The cargo was given up by the plaintiff to Dr. Wendt in order to get the freight, and an undertaking to pay the freight was given. It was also contended on behalf of Dr. Wendt, that if the owner of the *Ettrick* had himself salved the property he could not have claimed salvage, and that he could not do so now that some one else had salved it. In support of this three cases were cited: *Schloss* v. *Heriot* (1), where the plaintiff was a shipowner, and his actionable negligence was held to be a bar to claims for general average to contribute to losses caused by such negligence. The *Cargo ex Capella* (2), in which Dr. Lushington says:—

> The question for me to determine is whether when a collision has taken place between two vessels and both vessels are held to blame, one of them can sue for

(1) 14 C. B. (N.S.) 59.

(2) Law Rep. 1 A. & E. 356.

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salvage for having saved the cargo of the other from the perils consequent on the collision. I do not seek for authorities, but I look to the principle which ought to govern the case. In my mind the principle is this, that no man can profit by his own wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by any English Court. The application of this rule to the present case is obvious. The asserted salvors were the original wrong-doers; it was by their fault that the property was placed in jeopardy. The rule would bar any claim by them for services rendered to the other ship which was a co-delinquent in the collision. But the present claim, it is to be observed, is a demand for salvage against the cargo, the owners of which were perfectly innocent.

The *Norway* (1) was also cited, but in that case the facts were very complicated, and portions of the judgment of the Admiralty Court were reversed on appeal (at p. 404), and although I see no reason to question the soundness of the principles of law laid down by Dr. Lushington (at p. 393) with respect to the responsibility of a shipowner for cargo jettisoned in consequence of the negligence of his servant, I do not rely upon that case. It was further strenuously denied that there was really any salvage properly so called, but simply the performance of a duty under one or both of the two statutes before mentioned, and if there was no salvage there could be no general average, and if no general average, then no lien attached to the wool, and the case of *Schuster* v. *Fletcher* (2) was relied on. In that case it was said that—

> The shipowner had an interest in getting the ship off and bringing the cargo into port, in order that he might earn his freight . . . . A great deal of what he has done was in the performance of his own contract; he was bound to use every effort to convey the cargo safely to its destination, and could only give up the task when it was hopeless.

These observations appear to me applicable to the present case. If the contention of the owner of the *Ettrick* were well founded, the result substantially would be that he, having broken his contract by damaging the cargo and not bringing it to the port of destination, and having limited his liability for this wrong, would be entitled nevertheless to a pecuniary contribution from the cargo towards defraying the expenses incident to raising the ship in which the cargo was. Thus, the cargo owner would suffer a double injury: first, by limitation of the wrong-doer's liability

(1) Br. & L. 377, 404. (2) 3 Q. B. D. 418.

which debars him from a restitutio in integrum; and, secondly, by compelling him to pay a portion of the cost of repairing the mischief caused by the wrong. At this manifestly inequitable conclusion the Court would arrive with great reluctance. In my judgment, however, there was no salvage service properly so called, but a simple performance of a prescribed duty, and if there were a salvage service the limitation of the owner's liability would not entitle him to demand from Dr. Wendt any contribution to it.

Upon the whole, and after careful consideration of the arguments and the cases relied on, I am of opinion that the owner of the *Ettrick* is not entitled to the sum of 124*l.* 15*s.* 2*d.*, or to any sum by way of general average, and that he is not entitled to be paid this or any other sum by Dr. Wendt personally.

Judgment for Dr. Wendt.

The plaintiff appealed.

Millar, Q.C., and *Phillimore*, for the plaintiff. The owner has, by paying the 8*l.* a ton, been released from all further liability in respect of the collision. If the wool had been left at the bottom of the sea Dr. Wendt would have lost it, and could only come upon the money paid into court, and he has done so. As it is, the owner has paid the expenses of raising, and has the same rights as any other salvor. The ship was raised under the Removal of Wrecks Act (40 & 41 Vict, c. 16), the 6th section of which makes the ship and cargo a common fund to defray the cost. No doubt there is the Thames Conservancy Act (20 & 21 Vict. cxlvii. s. 86), but that is merely a private Act, and the general Act must be taken to apply first. Dr. Wendt has no claim against the owner, who is no longer a wrong-doer: *Chapman* v. *Royal Netherlands Steam Navigation Co.* (1) This is outside the negligence: *The Northumbria.* (2) If the ship had been sunk by accident the Conservancy would have raised it, and the costs would then have been borne rateably by ship and cargo; and as far as the owner is concerned that must be taken to be the case now. The acts of the Conservancy cannot alter the rights of other parties. They had possession of ship and cargo, and were bound to hand them

(1) 4 P. D. 157. (2) Law Rep. 3 A. & E. 6, 24.

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back to the owner, who cannot have any part taken away from him except on payment of whatever claim he may have.

Myburgh and *Stubbs*, for Dr. Wendt, were not called upon.

JESSEL, M.R. (after stating the facts of the case). First of all what is the position of the owner. This is not a case in which it is pretended that 8*l.* per ton would in any way pay the owner of the wool. The wool has been delivered to him in a damaged state, and it is not alleged (which might make the difference) that he has been or will be paid for it. Of course if the 8*l.* had been the value of the wool—if there had been some of the cargo that was not worth 8*l.* per ton, he could not receive the money and get the cargo; but it has been admitted that that is not so, and that the payment of 8*l.* per ton, whatever legal effect it may have under the statute, as regards the limit of liability, would, irrespective of that statute, not at all have affected the rights of the parties, the wool having been, as I understand, damaged to a greater extent. That being so, the statute which limits the liability of the owner, says nothing about the rights of the ship and cargo, but leaves that to be dealt with by general law. All it says is, in the 54th section of the Merchant Shipping Act (25 & 26 Vict. c. 63), that the owners of any ship in certain events, shall not be answerable for damages in respect of the loss to ships or goods to a greater amount than the sum of 8*l.* for each ton of the ship's tonnage. That is merely the limit of the liability for damages. It does not in any way alter the property, though that would be a consequence if it turned out there was a limited liability on account of the goods. Now, the property not being altered, the ground upon which the shipowner puts his claim is this: He says that the payment of 8*l.* per ton not only prevents his being answerable in damages for any more, but is equivalent to saying that he shall be in exactly the same position as if no negligence had been committed, and nothing had been done by him or by his agents that would give rise to any liability. But I cannot read the Act so. All that it says is that he shall not be answerable in damages for any greater amount. It does not make his acts right if they were previously wrongful. It does not give him any new rights as far as I can see, and it appears to me that

if the owner of a vessel and cargo, which by the default of him or his agent had been sunk in collision, after paying 8*l.*, had raised the vessel and cargo (and it was not a case where 8*l.* a ton was more than the damage done to the cargo), he would not have any right to the whole of the cargo, or that having raised the vessel for his own benefit, if he or his agent had been the cause of sinking the vessel, he would thereby be entitled to salvage on the cargo, or to general average, or to anything in the nature of general average. It seems to me he would have no such right, for the statute does not destroy the effect of all that had been done, as it simply diminishes or limits the liability in damages. If that is so, of course there is an end of the case. But it seems to me that there is another answer. It is assumed on the part of the appellant that the ship was not liable in the first instance to these charges, but that the ship and cargo were rateably liable under the Thames Conservancy Act; but as I read the Thames Conservancy Act that is not so. The ship was raised under the powers of the 86th section, and that section is: that if the Thames Conservancy think that it is a proper case for raising they may raise, and then they are required "in case such vessel shall be weighed and raised, to cause the same, and the furniture, tackle, and apparel thereon, or of any part thereof respectively, and also all or any part of the goods, wares, merchandise, chattels, and effects, which may be found on board the same, to be sold by public auction or otherwise," and they are to apply the proceeds of the sale to pay the charges and expenses of weighing and raising such vessel. Therefore these three things appear. First of all injury to the navigation is caused by the vessel. Secondly, the conservators are compelled to sell the vessel. They are not compellable to sell the furniture or the goods, or any part of the furniture, or any part of the goods, but they are compellable to sell the vessel, and they have an option of sale as regards the rest. It is obvious that the first moneys to be applied are the proceeds of that which they are compelled to sell, and that answers the first part of the case. That construction is further confirmed by this, that the object of selling the furniture and the cargo is, no doubt, to defray the charges which the vessel by its sale will not defray, and no doubt in that respect it diminishes the deficiency which the owner has to pay,

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although as owner he is the person who is ultimately liable. The whole section points to this, that though the conservators have a security both on the vessel and cargo, the vessel is primarily responsible, if I may use the term, and the cargo is secondarily responsible. I have been careful to consider in this case that as the value of the vessel is 1100*l.*, and the charges of raising are only 400*l.*, there would be no charge even as between the conservators and the owners of the cargo. Then, failing that, the appellant says that the conservators did not proceed under that Act, but under the general Act. The answer is that the powers given by the Thames Conservancy Act are so much more advantageous to them that of course they were acting under those powers, and not under the powers of the general Act. Under the general Act they had no powers against the owner, although they had under the special Act. That being so, it seems to me, quite independent of the first construction, that there would be no right to contribution, or anything in the nature of contribution against the cargo, or even as against the owner of the cargo. On this ground also the appeal must fail.

BRETT, L.J. In this case there was a collision, by reason of which this ship and the cargo were sunk. That collision was caused solely by the default of the shipowner, who is the present plaintiff. Thereupon he desires to limit his liability according to the Act of Parliament, and he calls upon everybody who would have a claim against him to come in. Whether they come in or not is immaterial, as he gets a declaration, that in respect of all claims from the owners of the cargoes of the other ship or his own, he shall not be liable to a greater amount than 8*l.* per ton. That 8*l.* per ton will be distributed amongst the claimants, and they can make no further claim against him in respect of the collision. If the matter had ended there, that Act of Parliament was done with. But something else happened afterwards —a new series of events, with which to my mind that Act of Parliament has nothing whatever to do. The ship and cargo being in the way of the navigation, the Thames Conservancy by virtue of authority given to them, do a thing which they often have done under the circumstances without any such authority, for

supposing there had been no Conservancy Act the Thames Conservancy might have raised the ship as salvors only. However, they raised the ship and the cargo, and in respect to that they have rights. They would have had rights as salvors as it seems to me, but they have other rights, and having done this thing they have under their act a power of sale if they are not paid otherwise. But that power of sale does not prevent them, if the person who is liable to them desires to pay the charges, from receiving payment, and they do so accordingly. The shipowner having paid the money for raising the ship, and possibly for raising the cargo, now says to the owner of the cargo, "I have paid this money. I admit I had not express authority to pay it for you, but I say nevertheless that you are bound to pay me part of what I have paid." As I understand him, he says first of all, "you are bound to pay me because you promised to pay me for a good consideration, and I have a lien upon this cargo; I gave that up to you in consideration of your promise to pay me what I have paid in raising the cargo in the nature of a general average or salvage." The answer to that is, that that is not a promise. It is not an absolute promise, but only a promise to pay him what he has paid in the nature of general average. If that was a promise or a contract, he would have been liable to pay. That is the whole of it. Therefore we are driven to see whether the defendant would have been liable to pay to the plaintiff this contribution in respect of money paid by the plaintiff, if there had been any such made. Now, first of all, could he claim that as a general average contribution? A general average contribution is a contribution in money paid to a person who has been obliged to pay for a general average loss. If the plaintiff had not been in any fault, I am inclined at present to think that he would have been entitled to claim from the defendant if it was a general average contribution. But he has been in fault, and the authorities are decisive that if the general average contribution which he claims is a general average contribution, which arose by reason of a default of his, he cannot claim anything. Therefore, taking it to be a claim for a general average contribution, he is ousted by the authorities, because the loss was a loss occasioned by his own default.

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But then, as I understand it, he claims by virtue of the Conservancy Statutes, which, as he says, enable the Thames Conservancy to raise the ship and the cargo, and then to charge rateably in respect of the ship and the cargo; but to obtain it in the first place from the shipowner, who therefore was bound to pay in respect of the ship and in respect of the cargo, that being a payment on behalf of the defendant. Now, in the first place, that construction put upon the statute is wrong. All that the Thames Conservancy are anxious to do is to obtain payment, and if the ship is not sufficient they obtain it from the cargo. But even if it were the true construction, it seems to me the plaintiff would be met precisely in the same way, because what he would be claiming, although not strictly speaking a general average contribution, would be a contribution in the nature of general average, and then the same principle, which would prevent him from recovering from the defendant a simple general average contribution, would equally prevent him from recovering that which is in the nature of a general average contribution. In that case again, what the Thames Conservancy would be entitled to claim in respect of the cargo would be in respect of a loss of cargo caused by the plaintiff himself, and therefore, even though he would have been obliged to pay in the first place for the recovery of cargo, he could not have recovered that payment from the defendant, because the loss in respect of which the defendant's goods would be liable was a loss caused by the plaintiff.

But then it is said that the statute which limits the liability to 8*l.* purges the negligence and the default, and puts the plaintiff, on payment of the 8*l.*, into the position of a perfectly innocent person. Now that Act of Parliament is sufficiently tyrannical as it is, but conceive what it would be upon this interpretation of it. The adverse ship is lost, and all the cargo of the adverse ship is lost. The 8*l.* per ton may not, and very likely will not, pay 10 per cent. of each person's actual loss, and yet is it to be supposed that the legislature have said to the person who occasioned the loss, "You are an innocent person, you are purged, and you have all the rights of an innocent person, with regard to people to whom you have paid less than 10 per cent. of the loss occasioned by your default." Such a construction of the Act of Parliament makes

the legislature say something which it is impossible to conceive that any rational legislature would say.

COTTON, L.J. I am of the same opinion. The first question is whether there is a special contract between these parties that the sum claimed shall be paid. Now, in my opinion, there is no such contract. [His Lordship then gave his reason for coming to this conclusion on the construction of the letter of the 27th of March, 1880.]

Then, independently of the contract, what are the rights of the parties? I take it, first of all, without reference to the Thames Conservancy Act, but treating this as in the nature of a general average contribution, that the claim is one founded on equity, namely, that where a person has incurred expense for the general benefit of the whole adventure he shall claim contribution from all those who are interested. But it would be against equity to say that the person who himself has done the wrongful act which caused the expenditure shall claim thereupon from anybody else, and the cases have decided accordingly that where the expense has been incurred in consequence of the wrongful act of the person who incurred it, he cannot claim contribution in the way of general average. Then it is said that the Merchant Shipping Act makes a difference; that the result of those sections in the Act which enable a shipowner to limit his liability, is to purge his wrongful act, and entitle him to say—not while he is being sued for damages, but while claiming a sum to be paid to him—that he is not a wrong-doer, and that the expense cannot be considered as having been incurred in consequence of a wrongful act of his. But these are not the words of the statute, it only says that he shall not be answerable in damages with respect to certain loss beyond 8*l.* per ton. Here there is no claim, as it seems to me, for damages in consequence of the result of the shipowner's wrongful act, but he is seeking to retain the goods of another person till a payment has been made to him for expenses, simply caused by his own wrongful act. Then it is said further that the judgment of this Court in *Chapman* v. *Royal Netherlands Steam Navigation Co.* (1) supports the plaintiff's contention. But the

(1) 4 P. D. 157.

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whole question there was whether there being actions by both ships, the damages being divided, and each being entitled only to a half, the judgments were to be considered as two judgments, or one judgment only for one damage, and the Court held that there were two judgments for two acts of damage.

As to the questions raised under the Thames Conservancy Act, whether that Act does or does not require the ship first to be sold, I should be of opinion that it was in no way intended to alter what, irrespective of the Act, would have been the rights as between themselves the owners of the ship and the owners of the cargo. It was simply intended to give the conservators power to remove obstructions and to re-imburse themselves out of the proceeds of that which they had raised, and in my opinion it could not properly be held, in the absence of express terms, to alter the rights of the shipowner and the owners of the cargo as between themselves. But we have an indication of an intention that the owner of the ship is to be primarily liable, because the right is given to the conservators to claim from him any deficiency in the amount of expense beyond that which was provided for by the sale of that which they have sold. I think the proper course would be first to sell the ship and that which belongs to the shipowner, and then to proceed if necessary to sell the goods. But what I principally rely on is the provision that the shipowner is to be liable and capable of being sued by the conservators, showing that it is meant to give a primary remedy against the shipowner. In my opinion the appeal fails.

Judgment affirmed.

Solicitors for plaintiff: *Ingledew & Ince.*
Solicitors for defendant: *Walters & Co.*

C. M.

[IN THE COURT OF APPEAL.]

1881
July 19.

THE LIBRA. (1880 J. 1181.)

Thames—Rules for the Navigation of the Thames—Rules 22 and 23—Coming to Points—Porting.

The 22nd and 23rd rules for the navigation of the Thames are not inconsistent, and the intention is that when the 23rd rule (as to passing a point) applies, the case for the 22nd (as to porting) shall not arise, but if the case does arise the rule will apply.

A steam vessel coming down the Thames against tide to a point on the north shore, and being nearer to mid-channel than to the north shore, eased and, then seeing danger of collision with a vessel coming up with tide, starboarded and reversed. The other vessel was coming up with the tide also near the north shore and rounded the point under a port helm; seeing the other vessel, she ported hard, and stopped, but a collision occurred:—

Held, that under the circumstances the 22nd rule applied, and that the vessel which had starboarded was to blame.

By Jessel, M.R., and Brett, L.J. (Cotton, L.J., doubting), that under the 23rd rule the vessel navigating against tide is to wait until she has been passed by the other vessel, and not merely until the other vessel has passed the point.

ACTION and counterclaim for damages by collision.

The *Joseph Ricketts* was a steamship of 449 tons, and was, on the 11th of November, 1880, coming up the Thames on the north shore towards Tilburyness with a cargo of coal. The *Libra* was a steamship of 617 tons going down Northfleet Hope, and according to her account she was on the north shore, the tide being first quarter flood. The conclusions of the Court as to the distance of the *Libra* from the north shore will be seen in the judgments below. The *Joseph Ricketts* saw the lights of the *Libra* over the point and ported her helm, intending to pass port side to port side, when she saw the green light of the *Libra*, whereupon her helm was put hard a-port and her engines were stopped and reversed, but she came into collision with the *Libra* and suffered damage. The *Libra* had seen the mast-head light of the *Joseph Ricketts* and therefore eased and kept her course, meaning to pass starboard side to starboard side, but afterwards seeing the red light of the *Joseph Ricketts* and that there was danger of collision, her helm was put hard a starboard and her engines were reversed. A claim for damages was brought by the owners of the *Joseph*

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Ricketts, and a counterclaim by the owners of the *Libra*. The action was tried in the Admiralty Division before Sir J. Phillimore and two Nautical Assessors on the 28th of January, 1881. Witnesses were examined on both sides.

Myburgh, and *Phillimore*, for the *Joseph Ricketts*.
Butt, Q.C., and *Clarkson*, for the *Libra*.

SIR R. J. PHILLIMORE. This is a case of collision of some importance, because it calls upon the Court for the first time to put a construction upon some of the new steering and sailing rules for the river Thames. The collision took place in Northfleet Hope, between five and six o'clock on the evening of the 11th of November last year. The weather appears to have been fine and clear, and the tide was first-quarter flood, running about two knots an hour. The vessels which came into collision were the *Joseph Ricketts* and the *Libra*. The blow was dealt on the starboard side of the *Libra*, in front of the bridge, by the stem of the *Joseph Ricketts*. The *Joseph Ricketts* was a steamship of 449 tons, she was proceeding up the river Thames with a cargo of coal. The *Libra* was a steamship of 617 tons register, and was going from London to Hamburgh, in ballast, in charge of a duly licensed pilot. The collision took place about 250 yards above Tilburyness. Those on board the *Joseph Ricketts* observed the masthead and red lights of the *Libra*, about three-quarters of a mile off, and about two points on their port bow, coming down the reach. The *Joseph Ricketts* ported and then steadied, and was proceeding as she says to pass the *Libra* port side to port side when the *Libra* opened her green light; the helm of the *Joseph Ricketts* was put hard a-port, and her engines were stopped and reversed, but the *Libra* shut in her red light and struck the *Joseph Ricketts* with her starboard side forward of her midships. The *Libra* says that she was proceeding down Northfleet Hope, and that she saw the masthead light of a steamship, which proved to be the *Joseph Ricketts*, over Tilburyness, from half to three-quarters of a mile off, and bearing on the port-bow of the *Libra*. The statement of these facts introduces the consideration of the rules which apply to the case, and in my judgment both the 22nd

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and the 23rd of the rules for the navigation of the river Thames apply. [His Lordship then read the rules. (1)] The object of these rules appears to the Court to be to get rid of the many former difficulties with respect to vessels rounding these points, and also as to vessels meeting each other so as to involve risk of collision. In our judgment the *Libra* did ease her engines, but did not wait as required by the 23rd rule. She herself pleads that she was kept on her course, and that when she saw the red light of the *Joseph Ricketts*, her helm was put, when about 300 or 400 yards off, hard a-starboard, and her engines reversed full speed astern. This appears to have been half a minute before the collision, and she had at that time way enough on her, it is to be observed, to run on shore. By the manœuvre of starboarding the *Libra* ran across the bows of the *Joseph Ricketts*, and thereby, in our judgment, occasioned the collision. It is complained on behalf of the defendant that the *Joseph Ricketts* ported too much and ran into the slack tide, but in our opinion the *Libra* was not justified in attempting to cut in between the *Joseph Ricketts* and the shore. It appears by the evidence that the *Libra* had gone off two points under her starboard helm at the time of the collision. Now had she put her helm a-port when she saw the red light of the *Joseph Ricketts* she would have gone off two points to starboard, and the collision would, in all probability, have been avoided. It appears also from the evidence, that the *Libra* well knew all along that the *Joseph Ricketts* was rounding the point under a port helm. The *Libra's* pilot says that when the *Joseph Ricketts* got two and a-half points on the *Libra's* starboard bow he saw all three lights of the *Joseph Ricketts*, shewing that the *Joseph Ricketts* was under a port helm, and it is apparent that when the *Joseph Ricketts* had passed the point

(1) Rules and by-laws for the navigation of the river Thames, issued by the Conservators; allowed by her Majesty in Council, on the 17th of May, 1880.

"22. When two steam vessels proceeding in opposite directions, the one up and the other down the river, are approaching one another so as to involve risk of collision, they shall pass one another port side to port side.

"23. Steam vessels navigating against the tide shall, before rounding the following points . . . . Coalhouse Point, Tilburyness, ... ease their engines and wait until any other vessels rounding the point with the tide have passed clear."

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she was still continuing under a port helm. In pursuing that course she, the *Joseph Ricketts*, obeyed, in our judgment, the 22nd rule, and intended to pass port side to port side, which she would have done but for the *Libra* starboarding. I pronounce the *Libra* alone to blame.

Judgment for the plaintiffs.

The owners of the *Libra* appealed. The only questions argued on the appeal were as to the construction of the navigation rules and the conduct of the vessels with reference to those rules.

Butt, Q.C., and *Clarkson, Q.C.*, for the *Libra*. The 22nd rule does not apply to a case like this. The *Libra* was coming down under the shore against tide as is usual, and the *Joseph Ricketts* was coming up with the tide and would keep to the south, so that in such a case the 22nd rule cannot apply. Both rules cannot apply at the same time, and the *Libra* properly eased and followed the 23rd. No sailor would have expected a ship coming up with tide to turn and go over to the north shore out of the tide. If the *Libra* had ported she would have been carried by the tide right across the river. Her proper course was on the north shore out of the tide, and the proper course of the *Joseph Ricketts* was well out in the tide.

R. E. Webster, Q.C., and *Myburgh*, for the *Joseph Ricketts*. There may be a difficulty as to the two rules, but the *Libra* obeyed neither. She neither waited nor ported. (They were stopped by the Court.)

JESSEL, M.R. This is an appeal from a decision of the judge of the Court of Admiralty, and it raises a point of construction of the rules for the navigation of the river Thames, and it also raises a secondary point as to the conduct of the respondent's vessel. The point of construction is this, putting it shortly. It has been argued that wherever the 23rd rule applies the 22nd does not; and the first thing to be decided is whether that is a correct mode of construing the rules. Now, in the first place, it must be remembered what these rules are. They are issued for the guidance of masters of vessels, and therefore the proper mode of construing them is to read them literally. I do not say that the

same rule of construction does not apply to other written instruments, except when it will lead to some inconsistency or absurdity, which must render it necessary at some inconvenience to give up the literal meaning: but certainly rules issued as these are should be construed literally if they can be construed at all. Now the rules themselves are not in form inconsistent. [His Lordship read them.]

I think that the 23rd rule means that the vessel must wait until vessels rounding the point have passed clear of the waiting vessel. It is not "have passed the point" but "have passed clear." Now, waiting and easing the engines may possibly, in the case put by Mr. Butt in his argument, mean when they are in the slack water near the shore, quite out of the way of the vessel coming with the tide. In this case it may very well be that the 22nd rule may not apply, because the event contemplated by the rule has not happened, as the vessels are not then approaching each other so as to involve risk of collision. One is in slack water near the shore and the other is coming up with the tide driving her over towards the other shore. Therefore there is no inconsistency in saying that rule 22 does not apply, because, as I said before, there is nothing for it to apply to. But if, instead of being close to the shore, the vessel which is coming down is in mid-channel, or near mid-channel, then I can quite understand that the rule must apply, because then the vessel that is coming up with tide may be approaching so as to involve risk of collision. And it appears to me, if it is so in fact, that there is no reason why the rule should not apply. In this case the vessel is going at half speed or slackened speed, but is still going on and may very well port her helm at that time, so as to pass the other vessel port side to port side. I can see no inconsistency and no difficulty in applying the rules. As I understand the facts in this case found by the learned judge, and not disputed on appeal (because he having found one way it is useless to address the Appeal Court on the facts), he did find that the *Libra* was nearer to mid-channel than to the north shore, and that she starboarded her helm and by doing that caused the collision. If that was so, it was the *Libra's* conduct that was the cause of the collision, and it was found by the learned judge that she was to blame. I now revert to the second point. The second

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point was this; it is said under rule 14, "every steam vessel when approaching another vessel so as to involve risk of collision shall slacken her speed, and shall stop and reverse if necessary." Now the question is whether the *Joseph Ricketts* (which was the "other vessel") came under this rule at any time before the *Libra* starboarded her helm. As I understand the evidence she did not, and there was no danger of collision until the *Libra* starboarded her helm; and the moment that happened we find from the evidence that the engines of the *Joseph Ricketts* were stopped and reversed, so that it does not appear to me that the 14th rule does apply so as to involve the *Joseph Ricketts* in any blame and make her jointly liable with the *Libra* for the collision. Under these circumstances it appears to me the judgment ought to be affirmed.

BRETT, L.J. I think that the facts to be taken in this case are that the two vessels sighted each other when they were the one above and the other below the point, and that they were so near to the point that the 23rd rule applied to them, and I think that the *Libra* was not close in to the north shore and under the point and in the slack water, and that the evidence is, and that the fact must be taken according to the finding of the learned judge, that she was so far out that if she had done nothing there was room for the *Joseph Ricketts* to have passed to the north side of her, that is port side to port side. I think that when the *Joseph Ricketts* had first come round the point under a port helm, she found the *Libra* so far out from the north shore that if the *Joseph Ricketts* had not then been under a port helm for the purpose of passing round the point, they were so near to each other that it would have been right for the *Joseph Ricketts* to stop and reverse. There would then have been danger of a collision, but the peculiarity of this case is that the *Joseph Ricketts* was coming round under a port helm, and that those on board the *Libra* could see it, and that there was no danger of a collision if the vessels had remained as they were, and it was not until the *Libra* starboarded that there became danger of collision, and then it is found that the *Joseph Ricketts* immediately stopped and reversed. Under these circumstances it is argued that the *Libra* did nothing wrong, that she

obeyed the 23rd rule, and that the 22nd rule did not and could not apply. In other words it is argued that the rules are so inconsistent that whenever the 23rd applies the 22nd cannot. I do not think that that is the right construction of the rules. I think that the intention of the 23rd rule is that when vessels are approaching the points named, the state of things should not arise which would make the 22nd rule applicable; but nevertheless if that state of things does arise, there is nothing in the 23rd rule which prevents the 22nd rule under the circumstances from applying.

Mr. Butt argued that the 22nd rule could never apply when the 23rd rule applied, because he said that when the 23rd rule was obeyed, the vessel going against the stream must always be in the slack water close in under the point. I do not see that. I do not see that the 23rd rule cannot be obeyed without that fact existing. All that the 23rd rule says is, that when it is likely that they may meet on the point, the vessel which is going against the tide shall wait. I think the meaning of that is that she shall so far check her speed as to prevent her coming up to the point at the same time when the other vessel would come there. The vessel going against tide is not only to wait until the other has passed the point, but to wait until the other has passed her. That is to say she is not to go up to the point till the other vessel has passed her, and if she was close in and in the slack when the other vessel came round this point, it is obvious that her green light will be to the southward, and the other vessel coming round will come round outside her, and that when she could see the side lights they would be green light to green light, the one outside, and the other close in shore. It seems clear to me that under those circumstances the 23rd rule would have been obeyed, and the 22nd rule would not be applicable, and therefore there would be nothing for the vessel coming with the tide to do but to keep out. But if the vessel that is coming down the river in such a case as this against the tide is not close in, and is so far out that there is room for the other vessel to pass inside her, they are to pass port side to port side, and then the vessel coming against the tide would have obeyed the 23rd rule in this, that she may have waited so as not to come to the point at the same time

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as the other, but here she was waiting so far out in the river that there was room for the other to pass port side to port side, and if that be true, although the 23rd rule has been obeyed by her waiting, the 22nd may be applicable. They may be approaching so as to run the risk of collision, and then their duty is to pass port side to port side, therefore it is not true that, whenever the 23rd rule applies, the 22nd does not. Neither is the converse true. The truth is that they are independent rules, and that it depends on circumstances whether the 22nd rule applies after the 23rd rule has been obeyed, or not. In this case it seems to me that the 22nd did apply, and that these vessels ought to have passed port side to port side. As far as my view goes the *Libra* did in this case obey the 23rd rule, but did not content herself with that, but being in a position where she ought to have obeyed also the 22nd rule, she broke the 22nd rule, and broke it not merely passively but actively by starboarding and so preventing the other from going port side to port side, which was the natural and proper course to take. It has been urged upon us that under certain circumstances in obeying the 23rd rule, a vessel might put herself into a position that she could not obey the 22nd, that is, if she was brought to a complete standstill in order to obey the 23rd, she could not obey the 22nd, because whether she ported or starboarded her helm it would have no effect on her as she had no motion in the water. To my mind it is not necessary in this case to decide that question. A vessel is not to be expected to do the impossible, and she should not be found to blame for not doing what she could not do.

COTTON, L.J. The most important question is whether rules 22 and 23 both apply in the present case. Now the two rules are not inconsistent. There is nothing in the mere terms of the rules which make them inconsistent, and the utmost that can be urged against them is that under certain circumstances they may produce a result of some difficulty. As I understand rules 22 and 23 they may well apply, and in my opinion they do apply to the *Libra* in the present case. Rule 23 has this effect, as I understand. It is intended to prevent the vessel which is coming against the stream from rounding the point at the same time as the vessel

going with the stream. Of course, if the two vessels were rounding the point at the same time there would probably be a collision, and therefore it is intended to prevent, as far as possible, such an occurrence when the vessels are both rounding the point, the one in one and the other in the other direction. I very much doubt whether the vessel which is coming against the tide to these points is bound to wait till the other vessel which is coming up with the tide should pass her. I rather think that the rule means to pass the point, but it is not necessary to decide that question. The 23rd rule is to prevent vessels from approaching one another with a chance of collision, but if it had not this effect, and they are approaching one another under circumstances which would involve risk of collision, then rule 22 applies, and then, when they come in a position which involves risk of collision, that not having been prevented by the operation of rule 23, rule 22 comes into operation, and then, in my opinion, that rule is to be obeyed, although rule 23 may have applied already to these steamers, and might under ordinary circumstances have prevented them from coming into the position of vessels approaching with risk of collision, and that is the material point in the case. On the other part of the case, I think it unnecessary to add anything to what has already been said.

Appeal dismissed.

Solicitors for the *Joseph Ricketts*: *T. Cooper & Co.*
Solicitor for the *Libra*: *W. Batham.*

C. M.

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June 23.

THE LEON. (1881 P. 76, Folio 6.)

Damage—Law applicable in Case of Collision between British and Foreign Vessel.

10 QBD 537
545.

In an action in personam, brought by the owners of a British vessel against the owners of a Spanish vessel to recover damages caused to the British vessel by collision with the Spanish vessel on the high seas, the defendants pleaded that they were Spanish subjects, and that if there was any negligence on the part of those in charge of the Spanish vessel it was negligence for which the master and crew alone, and not the defendants, were liable according to the law of Spain:—*Held*, bad on demurrer.

THIS was an action of damage, in personam, brought by the owners of the British vessel *Harelda* against the owners of the Spanish vessel *Leon*, resident in this country, to recover damages for a collision between the two vessels on the high seas.

The 10th paragraph of the statement of defence was as follows:—

"The defendants further say that, before and at the time of the said collision, the *Leon* was a Spanish ship sailing under the Spanish flag, and wholly owned by subjects of the King of Spain, and that if the said collision was occasioned by any improper or negligent navigation of the *Leon*, which the defendants deny, it was wholly occasioned by the negligence of the master or mariners of the *Leon*, and not by such owners or the defendants, or any of them, and that by the law of Spain in force at the time of the happening of the said collision and now, the master and mariners of the ship, and not the owners, are liable in damages in respect of a collision occasioned as in the statement of claim alleged, and by such law the defendants are not liable in respect of the damage proceeded for in the action.

To this paragraph the plaintiffs demurred.

Benjamin, Q.C., and *Myburgh*, for the plaintiffs, in support of the demurrer:—There is no case in the books where a foreign municipal law, differing from the general maritime law as administered in this country, has been held applicable where a collision has taken place on the high seas. The general maritime law as administered by the Courts of this country has always been held to govern in cases such as the present: *The Johann Friederich* (1); *The Dundee* (2); *The Zollverein* (3); *The*

(1) 1 W. Rob. 35. (2) 1 Hagg. 120.
(3) Sw. 96.

Wild Ranger (1); *The Mary Moxham* (2); *The Druid* (3); *The Volant.* (4)

Webster, Q.C., and *Clarkson, Q.C.*, for the defendants, contrà. It may be admitted that if the *Leon* had not sunk, and had been arrested here in an action in rem, the defendants might have been liable for the damage proceeded for, but this is an action in personam, and the same consequences by no means follow. In *General Steam Navigation Co.* v. *Guillou* (5), the collision was on the high seas, and the defendant was allowed to plead the law of France. If he could do so for one purpose, why could he not have done so for all purposes? At the present day there is no such thing as a general maritime law in universal use amongst all nations. Each nation has adopted whatever portions of what was formerly known as the general maritime law as was thought desirable, and at the present day the laws in force in the different maritime Courts of Europe differ widely: Marsden on Collision, p. 49. The question, therefore, comes to this, there being no general maritime law in existence, ought the decision in this case to be governed by English or Spanish law? Spanish law ought to be applied, because not only are the owners, whom it is sought to render liable, Spanish subjects, but the act, for the consequences of which it is sought to render them liable, was done on board a Spanish ship: *Lloyd* v. *Guibert.* (6)

SIR ROBERT PHILLIMORE. This is a case in which it appears that an English vessel, the *Harelda*, was run down by a Spanish vessel called the *Leon* on the high seas and was sunk. The owners of the English vessel brought an action of damage in personam against some of the owners of the Spanish vessel resident in this country, and the defence they set up in the 10th paragraph of their statement of defence is:—[His Lordship here read the 10th paragraph of the statement of defence as above set out.] This paragraph is demurred to, and the question now before me is whether the demurrer can be sustained or not. A great deal has been said upon the question of what law is applicable to this case,

(1) Lush, 553.
(2) 1 P. D. 107.
(3) 1 W. Rob. 391.
(4) 1 W. Rob, 383; 1 No. Ca. 503.
(5) 11 M. & W. 877.
(6) Law Rep. 1 Q. B. 115.

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and I agree with the observation that has been made that from ancient times the law administered in the Court of Admiralty was the general martime law, and that that law is still to be followed in this Court. It is not necessary for me to go very abstrusely into the subject of what law must govern in the present case, because two cases of recent date to which I have been referred, *The Wild Ranger* (1) and *The Zollverein* (2), seem to have disposed of the question. In the first place, however, I must observe that it has been admitted that if the *Leon* had been arrested in this case in an action in rem the liability of the defendants to be condemned in damages, if the collision should be shewn to have been caused or contributed to by the negligence of the master and crew of the *Leon*, could not have been disputed. Now in the case of *The Druid* (3) that learned judge Dr. Lushington said: "The liability of the ship and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible and vice versâ, no responsibility can attach upon the owners if the ship is exempt, and not liable to be proceeded against." In the case of the *The Volant* (4), reported in the same volume, and perhaps more accurately in the 1st volume of the Notes of Cases, the same learned judge said:—

> By the ancient maritime law, the owners of the vessel doing the damage were bound to make it good, though the amount of that damage might infinitively exceed the value of their own vessel and her freight. The owners of the vessel damaged might resort to a Court of common law or to the Court of Admiralty if they preferred coming to the Court of Admiralty they had their choice of three modes of proceeding, either against the owner, or the master personally, or against the ship itself. The Court has jurisdiction over the whole subject-matter of damages on the high seas, and the arrest of the vessel is only one mode of proceeding.

Moreover, in the case of *The Johann Friederich* (5) Dr. Lushington said, "All questions of collision are questions communis juris." But as I have before observed, the question appears to be disposed of by the decisions come to in the recent cases of *The Wild Ranger* (6) and *The Zollverein*. (2) In the former of these cases, which was decided before the passing of the Merchant Shipping Act, 1862, and therefore before the Legislature had expressly

(1) Lush, 553.
(2) Swa. 96.
(3) 1 W. Rob. 391.
(4) 1 W. Rob. 383; 1 No. Ca. 503.
(5) 1 W. Rob. 37.
(6) Lush, 553.

provided that foreign shipowners should be entitled to limit their liability for damage in respect of collision, Dr. Lushington said :—

The Court has found that the *Wild Ranger*, an American vessel, by improper navigation, came into collision on the high seas with a British ship; and the ordinary decree has passed condemning the owners of the American vessel in the damages. Under such circumstances, according to the ancient law, as stated by Lord Stowell in the case of *The Dundee* (1), the owners of the wrongdoing ship are responsible for all the damage occasioned.

In the latter of those cases (*The Zollverein*) the following passage occurs in the judgment of Dr. Lushington :—

Generally when a collision takes place between a British and a foreign vessel on the high seas, what law shall a Court of Admiralty follow? As regards the foreign ship, for her owners cannot be supposed to know or to be bound by the municipal law of this country, the case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place; if the foreigner comes before the tribunals of this country the remedy and form of proceeding must be according to the lex fori.

I am of opinion, without going further into the erudition connected with the question, that these authorities, independently of others that might be cited, are sufficient to enable the Court to decide that the law, which is applicable here and governs the liability of the defendants in the case, is the general maritime law as administered in this country, and consequently to pronounce that the demurrer must be sustained, and with costs.

June 2. The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House. After hearing evidence on behalf of the plaintiffs and the defendants, the judge pronounced that both vessels were to blame for the collision, and condemned the defendants in a moiety of the damage proceeded for.

June 23. *Clarkson, Q.C.*, on behalf of the defendants, moved the judge in Court that the defendants might be at liberty to amend their statement of defence by adding a counter-claim, and that a clause containing directions to that effect might be added to the order made by the Court on the trial of the action as above stated. The motion is made for the purpose of saving the expense

(1) 1 Hagg. 120.

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of a cross-action. It is clear that on instituting a cross-action the defendants will be entitled to a moiety of the damage they have sustained in the collision.

F. W. Raikes, for the plaintiffs, opposed the motion. No sufficient reason has been shewn for the Court interfering at this stage of the suit. The proper course is for the defendants to institute a cross-action.

HIS LORDSHIP refused the motion with costs.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Wynn & Sons.*

G. B.

March 24.

THE BUCKHURST. (1881 S. 328.)

Damage—Inevitable Accident—Costs—Infringement of Regulations for Preventing Collisions at Sea—Arts. 5, 6—*The Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.

A sailing ship in a gale drove from her anchors across a sand, and her rudder was so damaged as to render the ship unmanageable; in this condition she came into collision after sunset with a brig at anchor. At the time of the collision the ship had her anchor light exhibited and no other light. In an action of damage by the owners of the brig against the ship it was held that the collision was occasioned by inevitable accident, and that the ship in the circumstances of the case was not to be deemed in fault for not carrying side lights or the three red lights prescribed by Article 5 of the Regulations for Preventing Collisions at Sea, and that the suit ought to be dismissed without costs.

THIS was an action of damage instituted on behalf of the owners of the brig *Creole* against the ship *Buckhurst* and her freight. The action was brought to recover the damages sustained in a collision between the two vessels on the evening of the 18th of January, 1881, when the *Creole* at anchor in Penarth Roads, with a proper anchor light exhibited, was run into and damaged by the *Buckhurst*. The plaintiffs in their statement of claim alleged that the *Buckhurst* at the time of collision was under sail but carried no lights, and charged, inter alia, that those on board her had neglected to comply with Art. 6 of the Regulations for Preventing Collisions at Sea.

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The statement of defence alleged in substance as follows:

1. The *Buckhurst* was riding to her port anchor with ninety fathoms of cable out and to her starboard anchor with sixty fathoms out with her riding light duly exhibited and burning brightly and an anchor watch set and kept. The wind at such time was blowing a gale from the E.N.E. varying, and with hurricane force accompanied by thick blinding snow and the tide was about high water.

3. About 6.30 P.M. during a heavy squall the port cable parted and shortly afterwards the starboard cable also parted. Efforts were at once made to wear ship and to get out to sea, and at about 7 P.M. the weather having become worse, and there being a very heavy sea running, the *Buckhurst* struck heavily on Cardiff Sands, and whilst working over the sands received injuries which caused her to make a great deal of water and damaged her rudder, thereby rendering her helpless and unmanageable.

4. In this helpless condition the *Buckhurst*, from which a good look out was being kept, was drifting towards Penarth Beach, the hurricane and blinding snow still continuing, when about 8 P.M., the *Creole* was observed at anchor at a distance of about 100 yards a little on the port bow of the *Buckhurst*. The helm of the *Buckhurst* was put to starboard as far as its damaged condition would permit, the mizen staysail was hauled down and main and cross-jack yards squared in to try and pay the ship off, but notwithstanding, the *Buckhurst* came into collision with the *Creole*, her jib-boom and headgear crossing the deck of the *Creole*, and carrying away her masts.

6. The said collision was not occasioned by any neglect or default on the part of those on board the *Buckhurst*, and the said collision, so far as the *Buckhurst* was concerned, was the result of an inevitable accident.

On behalf of the plaintiffs, a reply was delivered wherein they denied that the *Buckhurst* was in a helpless and unmanageable condition, as alleged in the statement of defence, and further alleged that if the *Buckhurst* was in such helpless and unmanageable condition, then those on board her neglected to comply with Article 5 of the Regulations for Preventing Collisions at Sea.

The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House. The result of the evidence appears from the judgment.

Butt, Q.C., and *Nelson*, for the plaintiffs. The *Buckhurst* infringed the Regulations for Preventing Collisions at Sea, and must be deemed in fault for the collision under the provisions of the 17th section of the Merchant Shipping Act, 1873. If she was not unmanageable she ought to have taken down her anchor light and exhibited her side lights; and if she was

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unmanageable it was her duty to have exhibited the three red lights required by Art. 5 to be shewn by vessels not under command. If the *Buckhurst* had exhibited the lights required by either of these two articles, those on board the *Creole* would have had warning, and might have been able to take some measures which would have had the effect of avoiding the collision. In these circumstances the Court ought not to hold that the neglect of the *Buckhurst* to obey the regulations could by no possibility have contributed to the collision.

E. C. Clarkson, and *Myburgh*, for the defendants. The collision was clearly the result of inevitable accident. The neglect of the *Buckhurst* to carry the lights ordinarily required for a vessel in motion could not possibly have contributed to the collision. Moreover, the special circumstances of the case were such as to render it unnecessary for the *Buckhurst* to exhibit either her side lights or three red lights; she had been driven across the sands where no person would expect a vessel to be navigated. Indeed to have shewn either side lights under Art. 6, or three red lights under Art. 5, would have been misleading to other vessels.

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE. This is a case of collision which happened between eight and nine o'clock on the evening of the 18th of January last in the Penarth Roads. The vessels which came into contact were the brig *Creole*, a small vessel of 275 tons register, lying at anchor in these roads, and the *Buckhurst*, a vessel of 1877 tons register, manned with a crew of thirty-five hands, and laden with a cargo of coals. The *Buckhurst* was at anchor in these roads with her riding light exhibited and burning brightly. According to the evidence, at about six o'clock in the evening, the port cable of the *Buckhurst* parted and afterwards her starboard cable, and she struck heavily on the Cardiff Sands, and whilst working over the sands received some injuries which made her unmanageable. In the opinion of the Elder Brethren it is unquestionable that no blame attaches to the *Creole*. The state of the weather was of the worst possible description, and they think that the accident was inevitable.

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But the *Buckhurst* did not carry any light other than her anchor light, and it is contended that therefore, though the accident might otherwise have been inevitable, she is to blame for the collision, notwithstanding the state of the weather and the other circumstances of the case. The rule is laid down, and cannot be altered, that where by possibility a non-compliance with any of the Regulations for Preventing Collisions at Sea might have contributed to the collision, the vessel not complying with the regulations is to blame. Now the *Buckhurst* was on the sands about twenty minutes up to the time of the collision; and I have asked the Elder Brethren whether during that time it was her duty to put up her side lights, and they are of opinion that it was not, and that it would have misled other vessels if she had done so. The 17th section of the Merchant Shipping Act, 1873, provides that the ship by which the regulations have been infringed shall be deemed to be in fault, unless the circumstances of the case shew a departure from the regulations to have been necessary; and so far as concerns the time referred to when this vessel was on the sands, having regard to the opinion of the Elder Brethren that she ought not to have put up her side lights, and that if she had done so she might have misled the other vessel, it appears to me that the circumstances of the case did make a departure from the regulations necessary. Moreover, in our opinion, the non-carrying of the side lights or three red lights did not by any possibility contribute to the collision. The Elder Brethren are of opinion that the collision could not have been avoided in the dreadful state of the weather. I must therefore dismiss the suit.

Nelson applied that the action should be dismissed without costs. The practice of the Admiralty Court, which has been followed in this Court since the Judicature Act, is that in cases where a collision is the result of inevitable accident no costs are given, unless it was clear to the Court that the action ought not to have been brought: *The London* (1); *The Thornley.* (2) In the present case the plaintiffs were justified in bringing

(1) Br. & L. 82. (2) 7 Jurist, 660.

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the action, having regard to the fact that the *Buckhurst* had apparently infringed the Regulations for Preventing Collisions at Sea.

E. C. Clarkson, for the defendants. The plaintiffs came here to prove that the collision occurred by the default or neglect of those on board the *Buckhurst*. This they have failed to do, and in consequence, according to the practice of all the other Divisions of the High Court, to which the practice of this Division ought to be assimilated, they would be condemned in costs: *The Swansea*. (1) Moreover, even if the practice of the Admiralty Court as to costs in cases of inevitable accident is to be followed in this case, the plaintiffs ought still to be condemned in costs, inasmuch as they ought reasonably to have known that the collision in this case was an unavoidable accident, and that the action ought never to have been brought.

Nelson, in reply, was stopped by the Court.

SIR ROBERT PHILLIMORE. Having regard to the special circumstances of the case, and that the only light exhibited on board the *Buckhurst* was her anchor light, I do not think it can be said that the action ought not to have been brought. I think this is a case in which there ought to be no costs.

Solicitors for plaintiffs: *Lowless, Nelson, & Co.*
Solicitors for defendants: *Parker & Co.*

(1) 4 P. D. 115.

G. B.

[IN THE ARCHES COURT OF CANTERBURY.]

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Jan. 8.

THE OFFICE OF THE JUDGE PROMOTED BY COMBE *v.* BAGHOT DE LA BERE, OTHERWISE EDWARDS.

Ecclesiastical Law—Church Discipline Act (3 & 4 *Vict. c.* 86)—*Contumacious Clerk—Continuous Offences against Ritual—Deprivation ab officio et a beneficio—Practice.*

The Official Principal of the Court of Arches has jurisdiction to deprive ab officio et a beneficio a clergyman in holy orders holding a benefice in the province of Canterbury who has been articled against in a criminal suit in the Court of Arches, and has been in such suit proved to have been guilty, within two years of the institution of the suit, of contumacy; of incorrigible disobedience to the Ordinary and to the Canons of the Church; and of having failed to observe the Book of Common Prayer.

THIS was a cause of office promoted by Charles Combe, a parishioner of Prestbury, in the diocese of Gloucester and Bristol, against the Rev. John Baghot de la Bere the younger (1), vicar of the parish church of Prestbury, and came before the Court by virtue of letters of request signed by the bishop of Gloucester and Bristol, under the provisions of the Church Discipline Act.

The first seven of the articles exhibited in the suit were, omitting immaterial portions, in substance as follows:—

1. You, the defendant, have been for many years past (subject, nevertheless, to the suspension decreed and published as hereinafter mentioned), and now are a clerk in holy orders of the Church of England, and were during the whole of the two years next before the commencement of this suit (subject, nevertheless, to the said suspension decreed and published as hereinafter mentioned), vicar of the parish church of Prestbury, in the county of Gloucester, diocese of Gloucester and Bristol, and province of Canterbury.

2. You, the said defendant, were, by your then name of John Edwards the younger, duly admitted and instituted to the said vicarage of Prestbury on or about the 25th of October, 1860, and were in due course duly inducted thereto.

3. By 1 Eliz. c. 2, 13 & 14 Car. 2, c. 4, 28 & 29 Vict. c. 122, and the 14th, 36th, and 38th Canons of 1663, all clerks and ministers in holy orders are amongst other things bound to say and use the Book of Common Prayer and administration of the sacrament and other rites and ceremonies of the Church,

(1) For former proceedings against the Defendant, then known by the name of John Edwards the younger, see *The Office of the Judge promoted by Combe* v. *Edwards*, Law Rep. 4 A. & E. 390; 2 P. D. 354; 3 P. D. 103.

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according to the use of the Church of England, and not to use any other rite, ceremony, order, form, or manner of celebrating of the Lord's Supper, or matins, evensong, administration of the sacrament, or other open prayers than is mentioned and set forth in the said book, and any clerk or minister in holy orders offending against the said statutes, constitutions, and canons (save in so far as the same or any of them have been affected or modified by certain provisions in 34 & 35 Vict. c. 37, and 35 & 36 Vict. c. 35, none of which provisions apply to any of the practices, matters, or things in the following articles mentioned and objected against you, the said defendant) ought to be punished according to the gravity of his offence and the exigency of the law.

4. By the laws, statutes, constitutions, and canons ecclesiastical of this realm, and more particularly by or by virtue of the said statutes, 1 Eliz. c. 2, and 13 & 14 Car. c. 4, and the 58th canon of the said constitutions and canons ecclesiastical in the last preceding article mentioned, every minister of the Church of England when saying the public prayers or administering the sacraments or other rites of the church in parish churches in England, is required to wear the vestments thereby appointed and allowed in that behalf (that is to say) there in the said 58th canon mentioned, and that it is not lawful for such ministers, or any of them, when so saying such prayers or administering such sacraments or other rites in parish churches in England, to wear any of the following vestments or things (that is to say, a chasuble, alb, or stole).

5. You, the said defendant, in a cause of the office of the judge promoted by Charles Combe against you, by your then name of John Edwards the younger, were charged among other things with having within your church of Prestbury aforesaid, within two years within the commencement of the proceedings in the said cause, offended against the laws ecclesiastical in the following matters amongst others (that is to say).

Here followed a recital of certain of the articles in the above-mentioned suit of *Combe* v. *Edwards* (1), wherein the respondent was charged inter alia with having offended against the laws ecclesiastical in the unlawful use of lighted candles during the Communion Service, and the performance of other parts of divine worship; the unlawful elevation of the paten, or bread or wafer, and the cup during the Communion Service; the mixing water with the sacramental wine during the Communion Service; the unlawfully kneeling or prostrating himself during the reading of the Prayer of Consecration in the Communion Service; the making the sign of the cross when giving the elements to the communicants in the Communion Service; the unlawful use of divers unlawful ceremonial dresses, matters, and things during the Communion Service, and particularly of certain vestments and things called respectively a chasuble, alb, and stole.

(1) See 3 P. D. 103.

The 5th article then proceeded as follows:—

And on the 17th of July, 1877, the Right Hon. Sir James Plaisted Baron Penzance, Official Principal of the Arches Court of Canterbury, before whom the said case was heard by virtue of letters of request from the Bishop of Gloucester and Bristol, by his interlocutory decree pronounced and declared that the proctor for the promoter in the said cause had sufficiently proved the contents of certain of the articles given in and admitted on the part and behalf of the promoter in the same cause, which articles so pronounced to have been proved set forth among other things the charges hereinbefore mentioned, and that you had offended against the statute law, and the constitutions and canons of the Church of England as by law established, in the particular matters set forth in such of the said articles, as he the said judge did pronounce to have been proved as aforesaid.

And on the 23rd day of March, 1878, the said Right Hon. Sir James Plaisted Baron Penzance, Official Principal of the Arches Court of Canterbury, by his interlocutory decree in the same cause, having the force and effect of a definitive sentence in writing, did pronounce and decree that you be suspended for the term of six months from the time of publishing the suspension, from all discharge and function of your clerical office, and the execution thereof . . . . in the said parish church and parish of Prestbury and elsewhere within the province of Canterbury, and from receiving and taking any of the profits and benefits of the said parish or benefice, or of the fruits, tithes, profits, rent, rent-charges, salaries, fees, or other ecclesiastical dues and emoluments whatsoever belonging and appertaining to the said parish and church, and did suspend you accordingly, and did condemn you in costs, and did direct the said suspension to be published on Sunday, the 31st day of March, 1878, and did further admonish you to abstain for the future from the usages, practices, acts, matters, and things set forth in such of the said articles as he had pronounced to have been proved as aforesaid, and the said suspension was duly published in the church of the parish of Prestbury aforesaid, on Sunday, the 31st day of March, 1878, previously to the commencement of divine service on the morning of the said 31st day of March, 1878, and on the said 31st day of March, 1878, a monition under seal was, in pursuance of the said interlocutory decree of the 23rd day of March, 1878, duly served on you, admonishing you to abstain for the future from the usages, practices, acts, matters, and things set forth in such of the said articles as the said judge pronounced to have been proved as aforesaid.

6. You, the said defendant, after the said suspension had been duly published, did not desist from officiating in your said parish church of Prestbury aforesaid; but, notwithstanding and in disobedience of the said suspension so decreed as aforesaid, and pronounced by the said Right Hon. Sir James Plaisted Baron Penzance as aforesaid, did on Sunday, the 31st day of March, 1878, and on Sunday, the 7th day of April, 1878, and on Sunday, the 26th day of May, 1878, and on divers other days and times within the said two years, and while you were suspended as aforesaid, officiate, or pretend to officiate, in the said parish church of the parish of Prestbury aforesaid, in the public performance of divine service, and in the public administration of the Holy Communion; and did on the said 31st day of March, 1878, and while you were so suspended as aforesaid, refuse to allow the Rev. C. R. N. Lyne, clerk in holy orders, to officiate in the said church

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in your place and stead at the morning service in the forenoon of the said 31st day of March, and did prevent the said C. R. N. Lyne from so officiating, the said C. R. N. Lyne having, as you well knew, been duly appointed by the Bishop of Gloucester and Bristol, and being present at the said church on the said 31st day of March for that purpose, and being ready, willing, fit, and but for your preventing him able in all respects to officiate in the said church in your place and stead at such service, and thereby you became and were guilty of contumacy and of contempt of the said Court of Arches and the jurisdiction thereof, and moreover of incorrigibleness and obstinate disobedience to the ordinary and also to the Church.

Articles 7 to 13 inclusive charged the respondent with having on certain specified occasions within two years next before the commencement of the suit in which the articles were exhibited, and during the performance of divine service in the parish church of Prestbury used, or permitted to be used, the following observances, acts, matters, or things: the use of lighted candles when not wanted for giving light or as a matter of ceremony; the ceremonial and undue elevation of the paten or bread, or one of the wafers, and also of the cup during the Communion Service; the mixing water with the sacramental wine during the Communion Service, and the administration of such water mixed with the sacramental wine to the communicants; the kneeling, prostration, or bowing of himself or other clergymen during the reading by him or them of the Prayer of Consecration in the Communion Service; the making the sign of the cross when the elements were given to the communicants in the Communion Service; the wearing during the Communion Service of divers ceremonial dresses or vestments, or things of divers forms and colours, and with divers decorations thereon other than and besides or instead of the habits appointed and allowed by the laws of the Church of England; the wearing during the Communion Service of certain vestments or things called respectively a chasuble, alb, or stole.

The 14th and 15th articles, so far as material were in substance as follows:—

14. You, the said defendant, by reason of your having committed the several offences more particularly set forth and contained in the 7th, 8th, 9th, 10th, 11th, 12th, and 13th respectively of the foregoing articles, did thereby offend against the laws, constitutions, and canons ecclesiastical, and that notwithstanding the monition under seal of the Arches Court of Canterbury served on you on

the 31st day of March, 1878, and were guilty of incorrigibleness and of obstinate disobedience to the Church.

15. All the ceremonies, observances, and acts performed, used, and done, and as articled and complained of in the several preceding articles from the 7th to the 13th, both inclusive, were unlawful variations from the form and order prescribed and appointed by the statutes in the 3rd and 4th of the preceding articles mentioned, and by the Book of Common Prayer, and administration of the sacrament, and other rites and ceremonies of the Church, and are respectively contrary to the said statutes and to the constitutions and canons in the said articles mentioned, and at none of the services at which the said ceremonies, observances, and acts hereinbefore complained of took place was an additional service or a special service appointed by the ordinary within the intent and meaning of the said Act of 35 & 36 Vict. c. 35.

The 16th article alleged that by virtue of the premises and of the letters of request in the suit the respondent was subject to the jurisdiction of the Court; and the 17th and concluding article prayed that on due proof of the premises the respondent might be deprived ab officio et a beneficio, or be otherwise canonically punished according to the gravity of his offence and the exigency of the law, and be admonished from so offending in future, and be condemned in the costs of the proceedings.

1880. Nov. 20. The cause was heard before the Official Principal of the Arches Court [The Right Hon. Lord Penzance.] (1)

Witnesses in support of the articles were examined orally in Court on behalf of the promoter. The result of their evidence, so far as material, appears from the judgment.

Jeune and *Blakesley* appeared for the promoter.

The respondent, though thrice called into court, did not appear either in person or by counsel.

Cur. adv. vult.

Dec. 21, 1880. LORD PENZANCE. The proceedings in the present case are not taken under the Public Worship Regulation Act, nor have they any relation to that statute. They are instituted under the ancient ecclesiastical law of this country, and are prosecuted in this the Provincial Court of the Archbishop under letters of request issued by the bishop of the diocese in conformity with the Church Discipline Act. The promoter of the suit has in his

(1) The Court was held in the Public Library of Lambeth Palace.

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articles charged the respondent with various offences against the law of the Church in the matter of ritual, to which I will hereafter refer, and he asks at the hands of this Court that the respondent should be deprived of his benefice. That the judge of this the Provincial Court of the Archbishop of Canterbury has independently of statute the power and jurisdiction to deprive a clergyman of his benefice will not be questioned; and cases even within the present century have made it clear that this power may be exercised by the judge without the personal intervention of any ecclesiastic. It is a sentence however which the necessities of modern times have rarely called for, and the instances in which it has been pronounced have not in the nature of the offences charged resembled the case now before me. I do not on that account think it is to be doubted that deprivation stands on the same footing as the other censures of the Church, and may be inflicted in any case of a distinct ecclesiastical offence which, in the judgment of the Court, is of a sufficiently serious character in itself, or which is attended with sufficient circumstances of aggravation to require it, and that it is particularly applicable to cases of continuous offences, in which the lesser censures of the ecclesiastical law have been tried without effect.

While holding this opinion, I think it nevertheless very desirable to pass in review the instances, so far as the very meagre records of ecclesiastical law will permit me to do so, in which this power has been exercised, and to refer to such passages in the older books of the law as may tend to throw light upon the grounds of its exercise, and illustrate the place which it held of old in the censures of the Church. I must premise that these passages are to be found not only in the records of the ecclesiastical but in those of the common law also; for it was inevitable that a sentence of deprivation which touched the temporal interests involved in a benefice should from time to time come under the cognizance of the temporal courts.

I do not indeed find that in any case of purely spiritual cognizance the temporal courts have questioned the propriety of this sentence, or the right of the Court to inflict it; but there are many instances in the books in which (the cause of deprivation appearing) those Courts have approved of that cause, and thus

added the weight of their authority to the action of the spiritual courts. The case of *Allen* v. *Nash* (1) affords a ready example of the way in which the validity of a sentence of deprivation might arise in the temporal court. A rector had been deprived by the High Commission, he made a lease of the glebe to one Allen, the plaintiff, who was ousted by the defendant, and in conference of all the justices (says the report), they agreed with one voice against the plaintiff without difficulty, and the Chief Justice delivered their opinion openly in court that the High Commission can well "pur bon cause deprive an ecclesiastical person of his benefice as well as the bishop or the ordinary;" secondly, "that when the jury found he was deprived, as the special cause does not appear neither in the verdict nor in the sentence, nevertheless it is good enough."

In this case as the particular cause of the deprivation did not appear, no sanction was given to it by the Court. But in some instances presently to be cited it was otherwise.

In Ayliffe's Parergon, p. 208, under the head of deprivation I find the following: "All the causes of deprivation may be reduced to these three heads, viz., to a want of capacity, contempt, and crimes. But more particularly it is evident that the more usual causes of this deprivation are such as these," and then follows an enumeration among which is found, "incorrigibleness and obstinate disobedience to the approved canons of the Church, as also to the ordinary." In Godolphin's book which is spoken of by Lord Stowell in *Briggs* v. *Morgan* (2) as one of the "oracles of ecclesiastical practice," I find among the causes of deprivation "incorrigibleness and obstinate disobedience to the approved canons of the Church as also to the ordinary." (3) In the book called the Parson's Counsellor, by Sir Simon Degge, at p. 149, I find the following: "I have therefore thought fit to shew what causes of deprivation have been allowed and approved by the judges of the common law, or by any of the statutes of this realm. But there are many more causes of deprivation by the canons and ecclesiastical law which, being out of my profession, I shall not presume to discourse of." And then follows an enumeration amongst

(1) 1 W. Jones, 393. (2) 3 Phill. 325.
(3) Godolphin Repertorium Canonicum, p. 306.

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which is, "a parson, vicar, &c., may be deprived for being disobedient and incorrigible to their ordinary." In Doderidge's Complete Parson (1), Lecture 14, p. 75, is the following: "The causes of deprivation by censure in the spiritual court are to be referred to the common law, therefore let us remember such of them, upon which questions have been raised in the books of our law, all which causes mentioned severally, may be reduced to three principal points; first, want of capacity, second, contempt, third, crime." In Jacob's Law Dictionary, a book not without authority, in an enumeration, which I will quote more fully, under the head of "Deprivation," is the following:

> The causes of deprivation are many: If a clerk obtains a preferment in the Church by simoniacal contract; if he be an excommunicate, drunkard, fornicator, adulterer, infidel, schismatic, or heretic; or guilty of murder, manslaughter, perjury, forgery, &c. If a clerk be illiterate and not able to perform the duty of his church, if he be a scandalous person in his life or conversation, or bastardy is objected against him, if one be a mere layman, or under age, viz., the age of twenty-three years, be disobedient and incorrigible to his ordinary, or a nonconformist to the canons, if a parson refuse to use the common prayer or preach in derogation of it, do not administer the sacraments or read the articles of religion, &c.; all these have been held good causes for deprivation of priests.

In Comyns' Digest, tit. Prerogative (D. 21), under the head of "Deprivation: For what causes it shall be," are the following passages:—

> Every offence by an ecclesiastical person contrary to the duty of his function, may be punished by the spiritual court. . . . And therefore a parson may be deprived if he be a heretic. . . . So if he be obstinately disobedient to the lawful canons of the Church. . . . So if he be incorrigibly disobedient to his ordinary.

In *Mortimer* v. *Freeman* (2) the case was of an action for not setting out tithes. To prove that the plaintiff was not parson, the defendant exhibited a deprivation of the plaintiff for drunkenness by the High Commission, and the Court held, "for such a common fault after admonition the High Commissioners might deprive a minister." And in the *Bishop of Salisbury's Case* (3) "it was holden" . . . . "that, if a bishop, parson, or other ecclesiastical person do cut down trees upon the lands, unless it be for reparations of their ecclesiastical lands, and do or suffer to be done any dilapi-

(1) "A compleat Parson, or a Description of Advowsons or Church Livings," by J. Doderidge, London, 1641.

(2) Brownl. Rep. 70.

(3) Godb. Rep. 259.

dations, they may be punished for the same in the Ecclesiastical Court, and that the same is a good cause of deprivation of them of their ecclesiastical livings and dignities." Dilapidation is also stated to be a cause of deprivation in Comyns' Digest under the title before quoted. I mention these two latter causes of deprivation, namely, drunkenness and dilapidation, although they have no direct application to the circumstances of the present case, for the purpose of shewing that deprivation is a punishment not reserved only for cases of great moral turpitude or delinquency, though it would not probably in the discretion of the Court be applied to a case of drunkenness or dilapidation, except under circumstances of great aggravation. In Cro. Jac., p. 37, is reported a decision of considerable importance. It appears that all the Justices of England were summoned to the Star Chamber. The Chancellor asked "whether the deprivation of puritan ministers by the High Commissioners, for refusing to conform themselves to the ceremonies appointed by the last canons, was lawful." Answer, "that they held it to be lawful because the King hath the supreme ecclesiastical power which he hath delegated to the commissioners whereby they had the power of deprivation by the common law of the realm: And the statute 1 Eliz. c. 1, s. 18, which appoints commissioners to be made by the Queen, doth not confer any new power, but explain and declare the ancient power. And therefore they hold it clear that the King, without Parliament, might make orders and constitutions for the government of the clergy, and might deprive them if they obeyed not."

This decision involves three propositions, first, that the King may make canons and constitutions binding the clergy without the authority of Parliament. With this the present case is not concerned. Secondly, that for breach of the canon law the High Commission might well deprive; and thirdly, that the power of deprivation they had not by the statute but in exercise of the ecclesiastical law by the common law of the realm. A reference to the statute under which the High Commission was authorized and created justifies at once this last proposition, and places it beyond doubt that the power which the High Commission was thus said to "have by the common law," was the ordinary power residing in the ecclesiastical tribunals of the land, and which was

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conferred upon the High Commission as such under the statute. For 1 Eliz. c. 1, s. 18 provides that a High Commission is to be appointed:

> To exercise, use, occupy, and execute under your highness . . . . all manner of jurisdictions, privileges, and pre-eminences, in anywise touching or concerning any spiritual or ecclesiastical jurisdiction . . . . and to visit, reform, and redress . . . . all such errors, abuses, &c., which by any manner of spiritual or ecclesiastical power, authority, or jurisdiction, can or may lawfully be reformed.

In the case of the *Bishop of St. David's* v. *Lucy* (1), Lord Holt thus expressed himself, "The clergy are subject to a law different from that to which laymen are subject, for they are subject to obey the canons, for the convocation of the clergy may make laws to bind all the clerks but not the lay people. And if the clergy do not conform themselves, it will be cause of deprivation." In the case of *Philips* v. *Bury* (2) a special verdict raised the question whether deprivation of the Rector of Exeter College, Oxford, by the Bishop of Exeter as visitor was valid. These Judges held that it was not. Lord Chief Justice Holt (in an elaborate judgment which will be found copied from his own notes in 2 Term Reports, p. 346) held that it was. I do not cite the case for its direct bearing on the present question, the deprivation having been pronounced in the exercise of a purely visitatorial power, but I find this passage in Lord Raymond's Report "by Holt, C.J., contumacy was a good cause of deprivation which all the other justices agreed." And while on this subject of visitatorial power I may call attention to the following passage in Ayliffe's Parergon.

> And hence it is that the law distinguishes visitors into general and simple visitors. The first are they that have a full visitatorial power, of inquiring into all things that want reformation and amendment, and of punishing offenders if they see reason. And such a power has an archbishop over his province, and a bishop throughout his diocese. (3)

And again: (4)

> But in a case where the power of correcting is given to a visitor, the power of depriving his subjects of their benefices if their crimes require it is "eo intuitu," included in his commission by way of accessory, because according to this maxim of the law, "concesso uno videntur concedi omnia ad illud accessoria."

(1) 1 Ld. Raym. 449.
(2) 1 Ld. Raym. 9.
(3) Ayliffe's Parergon, p. 514.
(4) Ayliffe's Parergon, p. 515.

The visitatorial function of the archbishop is not of course executed in his Court of Arches, but it would be difficult to maintain that the powers and jurisdiction of the latter fell short of those attaching to the former. The case of *Bishop of St. David's* v. *Lucy* (1), above referred to, came before the Court again on a motion for a prohibition to the Archbishop of Canterbury who had deprived the Bishop of St. David's. It is reported in 1 Lord Raymond, p. 539; and the question raised was whether the archbishop had the power to deprive a bishop. The Court held that the archbishop had the power he claimed, and the Lord Chief Justice in delivering judgment said:

> It was always admitted, that the archbishop had metropolitical jurisdiction and the bishops swear canonical obedience to him, and where there is a visitatorial power there is no reason to question the power of deprivation; for the same superiority, which gives him power to pass ecclesiastical censures on bishops will give him power to deprive; it being only a different degree of punishment for a different degree of offence. (2)

I now turn to two cases, the circumstances of which apply themselves directly to the case now in hand. The most important of them is *Caudrey's Case.* (3) It was an action of trespass involving the right to the glebe belonging to the living of South Luffenham, and the jury found a special verdict setting out the facts of the case. The important part of the verdict is the following: "And that the said Robert Caudrey before the time of the trespass supposed was deprived of his benefice before the said High Commission, as well for that he had preached against the said Book of Common Prayer, as also for that he refused to celebrate divine service according to the said book, and shewed particularly wherein." It would have been of some interest to have known what these "particulars" were wherein he failed to celebrate according to the said book, but it is not without importance to note that Lord Coke did not consider them material to the legal question involved and omitted them accordingly from his report. There were several objections made in the case, but the main objection was this—that the power to deprive exercised by the High Commissioners was conferred upon them by the Statute of

(1) 1 Ld. Raym. 539. (2) 1 Ld. Raym. 541.

(3) 5 Co. 1.

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Uniformity of Elizabeth, and that under that statute they could not deprive for a first offence. It is worth while setting out the exact language of the judges in their answer to this objection:

"The proviso in the said Act doth make this question without question, for by it it is provided . . ."

And they there set out section 23, which reserves all ecclesiastical jurisdictions:

"So as seeing, if that Act has never inflicted any punishment for depriving or not obeying the Book of Common Prayer, yet the same being allowed and commanded to be observed for the uniformity of common prayer and the unity and peace of the Church; the ecclesiastical judge may deprive such parson, vicar . . . &c., as shall deprave or not observe the book as well for the first offence as he might have done by the censures of the Church and the ecclesiastical laws, as if no form of punishment had been inflicted by that Act."

Here then is a distinct decision that the Ecclesiastical Courts may properly exercise the power of deprivation in cases where the directions of the Book of Common Prayer for the performance of divine service have not been observed, and to this there are no qualifications added. The resort by the High Commission to the extreme penalty of deprivation in place of temporary suspension renders it probable that the offence for which Robert Caudrey was deprived, was one that involved an obstinate determination not to observe the book, or other circumstances of aggravation, but the law of the case did not depend upon any such circumstances; if it had, Lord Coke would assuredly not have omitted them in setting out the special verdict. It is right also to point out before leaving this case, that the language of the s. 23 of the 1 Eliz. c. 2, to which the judges referred, does by implication affirm this right of deprivation, for speaking of offences against the Act (the chief and most obvious of which would be a non-compliance with the Book of Common Prayer), it reserves to the Ecclesiastical Courts the power "to punish the same by admonition, excommunication, sequestration, or deprivation, and other censures and process, in like form as heretofore has been used in like cases by the Queen's ecclesiastical laws."

The other case to which I referred is that of *Pullen* v. *Clewer* (1), an ecclesiastical suit in which the judge pronounced sentence of

(1) 1 Hagg. 354, Appendix B.

deprivation, and that sentence was confirmed by the High Court of Delegates. The case is to be found in Mr. Rothery's Collection of Cases, No. 79, and is reported in the first volume of Haggard's Reports. The articles charge the respondent with "the neglect of his cure of souls, and of the execution of his clerical office in not preaching nor reading the common prayers (as set forth in the book called the Common Prayer Book) on Sundays and holidays, in not baptizing infants, and not reading prayers for the burial of the dead, and for omitting the due celebration of the sacrament." "The truth of the fact was" (says the report), "that several persons died unbaptized—several wanted Christian burial—non-residence—not reading prayers—and to these neglects were added obstinacy—and no amendment, notwithstanding the several monitions. For the Doctor it was urged . . . . that for omissions and negligences, the punishment was but suspension." The delegates upheld the deprivation by a large majority, nine being for deprivation and three dissenting. The reasons of some of the judges are given, the main reason for deprivation being that the respondent was incorrigible in not amending upon monition. The Bishop of Peterborough said, that the respondent "at ordination had made a vow to observe the commands of his Ordinary, that he had sworn canonical obedience and to be resident at his institution, and he had broken both; that obstinacy and incorrigibility were added to these crimes, and therefore deprivable; and if not so, the Church might throw up all jurisdiction, and every little vicar might set up for himself in defiance of his Ordinary."

From these authorities it is very evident, I think, that the punishment of deprivation has never been confined to any particular class or character of offences. Drunkenness, contempt, crime, dilapidations, incorrigibility, breach of the canons, disobedience to the Ordinary, incapacity, neglect of duties persevered in after warning, failure to observe the Book of Common Prayer these with several others form a catalogue of offences, the most diverse in character and varied in gravity. I come to the conclusion, therefore, as I have before said, that it is not the particular character of an ecclesiastical offence which alone warrants the application of the censure, but the gravity of the offence in each particular case taken in connection with its

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attendant circumstances, and carefully weighed in the estimation of the Court. For the purpose, however, of the present case, it is not needful that the Court should rely upon any general considerations of this kind, or travel beyond limits within which the sentence of deprivation has been already recognised: For the authorities cited have defined as punishable by deprivation the following four offences: Contempt or Contumacy — Incorrigible disobedience to the ordinary—Incorrigible disobedience to the canons of the Church—and lastly, Failure "to observe" the Book of Common Prayer.

Now, it appears to me that Mr. De la Bere has been guilty of all four of these offences. To make good this statement, I must shortly refer to the evidence. In the year 1874, a suit was commenced in this Court against the respondent, who is vicar of Prestbury, in Gloucestershire, by letters of request from his bishop; and on the 27th of November in that year, articles were admitted against him setting forth numerous and repeated offences in the matter of ritual. The respondent appeared and endeavoured to maintain that certain of the practices which had been charged against him were not contrary to law. As the two cases of *Clifton* v. *Ridsdale* (1) and *Durst* v. *Masters* (2) were then under appeal to the Queen in council, the case stood over until these appeals should have been decided and the law ascertained. After some delay, arising from a cause to which it is not necessary to advert, the Court pronounced several of the articles to have been proved, and suspended the respondent from his office for a period of six months. These events took place more than two years before the commencement of this suit, and are only material therefore in so far as they give a character and complexion to the conduct which forms the substance of charge in the present proceedings. The decree of suspension was served upon him on the 31st of March, 1878. He took no heed of it, but continued to perform the services of his church as before. In addition to the suspension, he was, according to the practice of the Court, admonished to refrain from his illegal practices in future. This order of the Court he treated with the same contempt as the suspension, for the evidence shews that after the period of his suspension had

(1) 1 P. D. 316, 383. (2) 1 P. D. 123, 373.

elapsed, as well as during its continuance, he habitually continued his illegal practices. These practices are fully set out in the articles, and were fully proved. It is not necessary to say more of them here, than that they all involved departures from the authorized ritual of the Church, and have all been declared illegal by the highest ecclesiastical tribunal of the realm. The evidence embraces a period commencing with the 31st of March, 1878, and therefore within two years of the commencement of this suit, and continuing at intervals during that and the following year, it extends up to the 4th of January in the present year. And it has been very plainly proved that on the several days in the articles mentioned, the respondent committed again and again the very offences which had formed part of the original charges against him, and had been proved against him in the former suit, and which were the very offences for which he was suspended from his office, and from which he was admonished to refrain in future. It would be difficult to describe a case of more perverse contempt and contumacy than this. If a deliberate disregard of the Court's admonition and an open defiance of its decrees constitute the offence of contempt, then has the respondent undoubtedly been guilty of that offence. I pass to the next of the four offences to which I have referred, "Obstinate disobedience to his ordinary." It is to be inferred that much more has passed between the respondent and his ordinary than is now before the Court. But there is little difficulty in determining how far the respondent has obeyed him. It was by letters of request from his bishop that the first suit was instituted against him, which would hardly have been the case if the bishop could have obtained his obedience in any other way. In that suit the Court found it necessary (after giving him an opportunity of conforming to the law), to suspend him from his office, and thereupon the bishop in the exercise of his duty sent a clergyman, named Lyne, to take the respondent's duties during the suspension. When this gentleman presented himself at the church for that purpose, the respondent (knowing that Mr. Lyne had the bishop's authority) peremptorily dismissed him and refused all intervention on his part. Lastly, it has been by letters of request again from his bishop that he is now again before this Court. This is a strong primâ facie case of obstinate

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disobedience to the lawful commands and directions of the ordinary; it was charged as such in the article; the respondent has made no answer to it, and in the absence of any extenuating or explanatory evidence, it establishes, I think, the charge of incorrigibleness and obstinate disobedience to that authority. Of these two offences, Contempt of this Court and Disobedience to the bishop, certainly not the least in my judgment is that of being "disobedient and incorrigible to the ordinary." The duty of correcting and holding in check the parochial clergy has from the earliest times of the Church devolved upon the bishops. The legislation of modern times has confirmed them in the sole possession of this power, and invested them afresh with this duty to the fullest extent. For the Church Discipline Act has made it impossible that any clergyman should now be prosecuted in the spiritual court, except by the direction or with the consent of his bishop, and no step can be taken under the Public Worship Regulation Act save under the bishop's sanction. Protected thus from vexatious proceedings from without, the clergy are bound to yield obedience to the authorities set over them within the Church; it cannot, therefore, be a matter of surprise that the mere fact of being "incorrigibly disobedient" to the ordinary should find a prominent place in the old ecclesiastical books as a good cause of deprivation. It is not without regret that I refer to another and still stronger reason for placing disobedience to the ordinary, by an ordained priest, among the highest of ecclesiastical offences. But it is impossible to forget in connection with this subject, the solemn promises and engagements into which every ordained priest enters when he is admitted to the ministry of the Church. A question is put to him by the bishop in these words, "Will you reverently obey your ordinary and other chief ministers unto whom is committed the charge and government over you, following with a glad mind and will, their godly admonitions, and submitting yourself to their godly judgment?" and the answer is, "I will so do, the Lord being my helper."

I now come to the offences of obstinate disobedience to the canons, and failure "to observe the Book of Common Prayer." These two offences, so far as the circumstances of this case are concerned, are in truth but one offence viewed in two aspects.

Exact observance of the Prayer Book is enjoined by the Act of Uniformity, and to fail to observe it is an offence not only against that statute, but against the Queen's ecclesiastical laws. *Caudrey's Case* (1) is a distinct authority for this proposition, and for the farther proposition that for this offence a man may lawfully be deprived, though it be his first offence only. But it is also an offence against the canons of the Church. The 14th Canon declares that "All ministers likewise shall observe the orders, rites, and ceremonies prescribed in the Book of Common Prayer: as well in reading the Holy Scriptures, and saying of prayers as in ministration of the Sacraments; without either diminishing in regard of preaching, or in any other respect, or adding anything in the matter or form thereof," and in further pursuance of the same object, the 36th Canon provides in imperative language that every clergyman about to be admitted by institution to any ecclesiastical living shall sign a declaration amongst other things, that he "will use the form in the said book prescribed, in public prayer and administration of the Sacraments and none other."

In this unmistakeable manner have the canons of the Church added their sanction and authority to that of the Legislature for the strict observance of the forms prescribed by the Prayer Book, to the exclusion of all other forms not so prescribed. When, therefore, Mr. De la Bere habitually and obstinately departed from the ritual of the Prayer Book, he was infringing the Canon law as well as the Statute of Uniformity, and in either aspect, in accordance with the authorities I have cited, has laid himself open to the sentence of deprivation. But there is yet another view of the subject to which his conduct gives rise, and another authority for the guidance of the Court. The case of *Sanders* v. *Head* (2) was a criminal suit against a clergyman for publishing a letter in derogation of the Book of Common Prayer, for which the Court suspended him for three years. Its bearing on the present case lies in the observations made by Sir Herbert Jenner Fust. He cites *Caudrey's Case* (1) at length, and he then refers to the fact that the respondent had openly and publicly declared, in conformity with the Statute of Charles II., his unfeigned assent

(1) 5 Co. 1. (2) 3 Curt. 565.

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and consent to the use of all things contained in the Book of Common Prayer; he also referred to the 36th Canon, and to the declaration which that Canon requires all clergymen to make before they be received into the ministry, and he then proceeds as follows: "I therefore think Mr. Head has incurred the extreme sentence of this Court, and that the Court would be justified in pronouncing against him a sentence of deprivation. If Mr. Head could not have obtained possession of his living, without assenting or consenting to the use of all things contained in the Book of Common Prayer, he cannot complain if by the sentence of this Court, he is placed in precisely the same situation as if he had not, within two months conformed to the provisions of the statute, and if he had not done so, he would ipso facto have been deprived." This reasoning appears equally applicable to the present case, substituting the declaration made by Mr. De la Bere in conformity with the 36th Canon for the publication required by the Statute of Charles. Mr. De la Bere's declaration signed by himself was put in evidence and it was in these words "I do solemnly make the following declaration. I assent to the thirty-nine Articles of Religion, and to the Book of Common Prayer . . . . and in Public Prayer and in administration of the Sacraments, I will use the form in the said book prescribed and none other, except so far as shall be ordered by lawful authority." If Mr. De la Bere had not thus solemnly promised to use the forms of the Prayer Book, "and none other," he could not have obtained his present preferment, and a breach of that promise would of itself according to the reasoning of the learned judge justify his deprivation. I say then with Sir Herbert Jenner Fust, that Mr. De la Bere has "incurred the extreme sentence of this Court." Is there any reason why the Court should forbear to pronounce it? Mr. De la Bere has not offered any, and I can find none for him. He cannot find fault with the rubrics, for he has voluntarily engaged to abide by them; and he cannot find fault with the tribunal which has interpreted these rubrics in a sense which condemns his practices, for it is the very tribunal which existed when he obtained his living in 1860, and by which he must have known that his conduct would be judged. One mode of measuring the gravity of an offence, is to consider the obligations which have

been broken through in the committing of it. The Statute of Uniformity—the Queen's ecclesiastical law—the approved Canons of the Church—the authority of his bishop—the authority of this the Court of the archbishop, and lastly his own solemn vow at the time of his ordination, and his written promise at the time of his institution—all these has Mr. De la Bere set at nought, and that not casually or inadvertently, but continuously, deliberately, and of set purpose. Far less than this would assuredly justify the sentence which the promoter asks. I am, therefore, prepared to declare that the promoter has sufficiently proved the articles, and to pronounce a sentence of deprivation; but the ancient practice of this Court was to pronounce this sentence in a written form signed by the judge which will necessitate some delay. In some modern cases this practice has it is true been departed from, but these cases are not numerous enough to have created a new practice, and as I am unwilling to raise needless questions, I shall prefer to follow the form used of old. It was part of the old practice that the promoter of the suit should draw up the sentence and porrect it as it was called to the judge for his adoption, subject to any alterations that he might make. The observations I have made to-day, will enable the learned counsel of the promoter to fulfil this task, and I shall adjourn the further hearing of this case until the 8th day of January next, to give him time to do so. On that day if nothing intervenes to prevent it, I shall be prepared to pronounce that the articles have been proved, and that the respondent be deprived of his benefice and preferments.

Jan. 8. 1881. The cause came on for judgment and sentence before the Official Principal of the Arches Court. (1)

It appeared by an affidavit brought in on behalf of the promoter that notice of the appointment for judgment and sentence had been duly served on the respondent.

The respondent was twice called into Court, but did not appear either in person or by a proctor.

Jeune and *Blakesley*, on behalf of the promoter, moved that sentence should be delivered, and tendered to the Court a written

(1) The Court sat in one of the Committee Rooms of the House of Lords at Westminster.

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sentence (1) which (omitting a recital therein of the articles in the suit) was in the following terms:—

In the name of God, Amen. Whereas there is depending in the Arches Court of Canterbury by virtue of letters of request from the Right Reverend Father in God, Charles John, by divine permission, Lord Bishop of Gloucester and Bristol, a cause of office promoted by Charles Combe against the Rev. John Baghot de la Bere the younger, otherwise Edwards, clerk, vicar of the vicarage and parish church of Prestbury, in the county of Gloucester, and in the diocese of Gloucester and Bristol, and the province of Canterbury, of which the said Rev. John Baghot de la Bere the younger, otherwise Edwards, clerk, has been by lawful citation on that behalf convened to answer to certain articles, heads, positions, or interrogatories touching and concerning his soul's health and the lawful correction and reformation of his manners and exercises, and more especially for having within two years before the commencement of the said cause offended against the law ecclesiastical as therein fully stated, which said articles were duly exhibited against him in the words and figures following:

[Here followed a recital of the articles as above set out.]

And whereas the said articles were duly given, exhibited, objected, and admitted in the said cause, and the same, or a true copy thereof, were duly served upon the said Rev. John Baghot de la Bere the younger, otherwise Edwards, and he was duly required to answer the same, but wholly failed and omitted so to do, and did not appear to the said citation, and did not either by himself or his proctor in that behalf attend the hearing of the said cause or offer any evidence therein, although he had due notice of the time and place when the same would be heard, and was thrice called in Court but was contumaciously absent.

And whereas we the said James Plaisted, Baron Penzance, Official Principal of the said Arches Court of Canterbury lawfully constituted, rightly proceeding in the said cause, and having heard, seen, and understood, and right fully and maturely discussed the merits and circumstances, and diligently searched into and considered of the whole proceedings had and done therein, and observed all and singular the matters and things that by law ought to be observed, and having heard the evidence and also counsel and a proctor on behalf of the said promoter (the said Rev. John Baghot de la Bere the younger, otherwise Edwards, having been duly cited, and having received due notice of all the proceedings, and being thrice called in Court, but in no wise appearing), do hereby decree, pronounce, and declare in pain of the said Rev. John Baghot de la Bere the younger, otherwise Edwards, that the proctor of the promoter has sufficiently proved the articles given, objected, and admitted in the said cause, And the promoter being present before us here in Court by his proctor, but the said Rev. John Baghot de la Bere, otherwise Edwards, having been thrice called, but being contumaciously absent, the proctor for the promoter praying sentence may be given and that justice may be done on his part. Therefore, we the said James Plaisted, Baron Penzance, having maturely deliberated upon the proceedings in the said cause, and the said several offences proved exacting by law deprivation of ecclesiastical promotions have thought fit to pronounce and do accordingly hereby pronounce, decree, and declare that the said Rev. John Baghot de la Bere the younger, otherwise

(1) The sentence was signed by the two counsel for the promoter.

Edwards, clerk, by reason of the premises, and for and on account of his said several offences ought by law to be deprived of all his ecclesiastical promotions within the said province of Canterbury, and especially of the said vicarage and parish church of Prestbury, and all profits and benefits of the said vicarage and parish church of Prestbury, and of any other ecclesiastical promotions within the said province of Canterbury whereof he may be possessed and of and from the glebe, fruits, tithes, rents, salaries, and all other ecclesiastical dues, rights, and emoluments whatsoever belonging and appertaining to his said ecclesiastical promotions, or any other ecclesiastical promotions within the said province of Canterbury whereof he is possessed, and we do deprive him thereof accordingly by this our definitive sentence or final decree which we read and promulge by these presents, and do also condemn the said Rev. John Baghot de la Bere the younger, otherwise Edwards, clerk, in the lawful costs made and to be made in the said cause on the part and behalf of the said Charles Combe the promoter by these presents.

His Lordship read the sentence aloud, and, having signed it, directed that an official copy of the same should be transmitted to the Consistorial Court of the Bishop of Gloucester and Bristol, together with an official copy of the Act in Court. (1)

(1) The Act in Court was so far as related to the delivery of the sentence as follows:—Moore prayed judgment and porrected sentence of deprivation, which, for his party, he prayed to be read, signed, promulged, and given, and the defendant having been thrice called, but in no wise appearing and being contumaciously absent, the judge read, signed, promulged, and gave the sentence by Moore porrected. . . .

In the margin of the act in Court were entered the names of the counsel and proctor of the promoter and of other witnesses present when the sentence was read and given.

On the 14th of January, 1881, on the application of counsel on behalf of Mr. De la Bere, a rule was granted by the Master of the Rolls to shew cause why a prohibition should not issue directed to Lord Penzance as Official Principal of the Arches Court to prohibit him from carrying into execution or otherwise giving effect to the sentence of deprivation above referred to, "such sentence being one which he the said Official Principal had no jurisdiction to pronounce and as pronounced being without jurisdiction and in excess of jurisdiction." This rule has not yet (November, 1881) been disposed of.

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April 9, 11.

THE MAID OF KENT. (1880. H. 770, fo. 80.)

Damage—Practice—Tribunal to decide Questions of Consequential Damage.

Although it is the usual practice of the Court in collision cases to refer all questions involving the amount of damages to the registrar assisted by merchants, yet, when consequential damages are claimed, it is in the discretion of the Court to deal, at the hearing of the action, with the question whether such damages are recoverable.

This was an action of damage brought by the owners of the barque *Kate Covert* against the paddle steamship *Maid of Kent.*

The statement of claim alleged, inter alia, that on the evening of the 7th of February the barque was lying anchored in Dover Bay with a proper riding light exhibited and a proper watch kept, and that the *Maid of Kent* ran against and with her main-mast fouled the jibboom of the barque, and caused the barque to drag her anchors and go upon the Mole Rocks, and thereby damage was done to the barque and she was compelled to take assistance, and great losses and expenses were incurred by the plaintiffs.

The 4th and 7th paragraphs of the statement of defence were, so far as material, in terms as follows:—

4. For and by reason of this collision the *Kate Covert* sustained no other damage save the loss of her jibboom and some other slight damage to her upper works. It is not true that the *Maid of Kent* in colliding with her caused the *Kate Covert* to drag her anchors, or to go on the Mole Rocks, or to receive the damage thereby alleged to have been sustained, or to take the assistance mentioned in the statement of claim.

7. The defendants say that the collision was an inevitable accident, and was not caused or contributed to by any negligence of the defendants or those on board the *Maid of Kent.* They further say that in any event they would be liable only for the aforesaid damage to the jibboom and upper works.

April 9. The action came on to be heard before the Judge, assisted by two Elder Brethren of the Trinity House.

The master of the barque was called and examined as a witness on behalf of the plaintiffs, and in cross-examination was asked by the defendants' counsel the following question:—Would not the *Kate Covert* have taken the ground where she was if there had been no collision? This question was objected to on the ground

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that it was irrelevant to the issues which the Court had to try, as it could only be relevant to the question of damage, which was a matter to be inquired into by the registrar and merchants and not by the Court.

Butt, Q.C., and *Clarkson, Q.C.*, for the plaintiffs, in support of the objection. It is clearly in accordance with the practice of the Court that questions of damage should be referred to the registrar and merchants. Indeed, if the plaintiffs succeed in proving that they had sustained any damage, however small, they are entitled by the practice of this Court to a reference to the registrar and merchants, and it is immaterial that the matter of damage is referred to in the pleadings before the Court: *The Thuringia* (1); *The Flying Fish.* (2) Moreover, relying on the practice as above stated being adhered to, the plaintiffs are not prepared with evidence as to the consequential damage sustained by the *Kate Covert*, and, indeed, if the present practice of going before the registrar and merchants in cases of consequential damage is not upheld, and witnesses as to matters respecting damages are examined in court, the expenses at the hearing will in all cases be greatly increased.

Webster, Q.C., and *W. G. F. Phillimore*, for the defendants, the owners of the *Maid of Kent*, contrà. There is no invariable rule of practice in this Court requiring that damage should be referred to the registrar and merchants. Where, as in the present case, matters of nautical skill and knowledge are involved in the claim for damage, the Court, having the assistance of the Trinity Masters, is the proper tribunal to entertain the question of damage: *The Mellona* (3); *The Linda.* (4) There is no ground for holding that the plaintiffs have been taken by surprise, as the question of damage is distinctly raised on the pleadings, but if necessary the Court would no doubt adjourn the hearing of the case for the production of further evidence.

Butt, Q.C., in reply.

Cur. adv. vult.

April 11. SIR ROBERT PHILLIMORE. In this case a question

(1) 1 Asp. Mar. Law Cases 283.
(2) Br. & L. 436.
(3) 3 W. Rob. 7.
(4) Swa. 306.

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has arisen as to the practice of the Court in cases of consequential damage, and the question was argued on Saturday last, when a good many cases were referred to upon the point, and the Court reserved its judgment, which it will now deliver. The question which the Court really has to determine is whether it is obligatory for the Court in every case of this kind to send the matter to the registrar and merchants. The general competency of the Court to hear and decide upon questions of this description is not denied, but the point raised is whether in all cases and all circumstances it is the practice of the Court to send a matter of consequential damage to be tried by the registrar and merchants. This point has not been expressly decided, and it may very well be that in some cases such a question should be referred to the registrar and merchants: but that in other cases it should not be. In some cases, from motives of economy, or where questions of nautical skill are involved, it is very desirable that the matters should be decided by the judge of the Court with the assistance of the Elder Brethren of the Trinity House. Now the cases cited for the plaintiffs I need not go into, because they do not prove more than that in the special circumstances the questions of consequential damage were considered questions to be referred to the registrar and merchants. But the cases referred to by the defendants fully establish the proposition that the Court has full power to deal with questions of this description with the assistance of the Elder Brethren of the Trinity House. The cases of *The Mellona* (1) and *The Linda* (2) and many more cases were cited, but it is not necessary to refer to them all. In the case of *The Aline* (3) the plaintiffs, whose vessel was damaged by a collision on a voyage to St. Petersburg, at the hearing claimed consequential damages caused, as they alleged, by their vessel being detained for repairs in this country beyond the Baltic season, and Dr. Lushington said that he would require it to be satisfactorily proved that every possible exertion had been made to get the cargo to St. Petersburg and to come back again before the close of the season, and not having sufficient evidence before him, he referred the question of damage generally to the registrar

(1) 3 W. Rob. 7, 13. (2) Swa. 306.
(3) 5 Monthly Law Mag. 202.

and merchants. That was all that was decided in that case. In the earlier case of *The Eolides* (1) Sir John Nicholl came to the conclusion that a claim for consequential damage could not be sustained. In the subsequent case of *The Linda* (2) Dr. Lushington came to a similar conclusion. In the last case I have mentioned, the Court itself dealt with the question whether there was on the facts before it any claim for consequential damage which could be sustained. In the present case the statement of claim contains the allegation that damage was done to the *Kate Covert* and she was compelled to take salvage assistance, and great losses and expenses were incurred by the plaintiffs. The allegation is met by the following averment in the statement of defence. [His Lordship here read the 4th paragraph of the statement of defence as above set out.] And in the last paragraph of the statement of defence the defendants say, "That the collision was an inevitable accident, and was not caused or contributed to by any negligence of the defendants or those on board the *Maid of Kent*," and they further say, "that in any event they would be liable only for the aforesaid damage to the jibboom and upper works," that is to say, that they are not liable for the consequential damage in this case. I am of opinion that it is proper that the Court should entertain and decide these issues with the advantage of the advice of the Elder Brethren of the Trinity House. Indeed, it was not denied that the Court, assisted by the Elder Brethren, would be a better tribunal to decide the question of consequential damage in the present case than the registrar and merchants, as the Elder Brethren would bring to bear on the question that nautical knowledge which they undoubtedly possess, but which may or may not be possessed by the registrar and merchants. I am of opinion in the result that the Court itself can and ought to go into the questions of consequential damage in this case at the present stage of the proceedings, and that the practice of the Court will not be interfered with by this being done, and I shall therefore rule accordingly, and allow the question objected to on the part of the plaintiffs to be put.

The examination of the plaintiffs' witnesses was then proceeded

(1) 3 Hagg. 367. (2) Swa. 306.

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with, but before the close of the plaintiffs' case a settlement of the action was arrived at, and the Court, with the consent of all parties, pronounced that the *Maid of Kent* was alone to blame for the collision and assessed the damages proceeded for at 60*l.*

Solicitors for plaintiffs: *Wynne & Sons.*
Solicitors for defendants: *Clarkson, Greenwell, & Wyles.*

G. B.

June 27.

THE KESTREL. (1024.)

Shipping Casualty Appeal—Shipping Casualty Investigations Act, 1879 (42 & 43 *Vict. c.* 72), *s.* 2—*Materials on which Appeal heard—Practice—Evidence of Experts not admissible on Questions of Nautical Skill and Knowledge—Costs.*

Although the Wreck Commissioner, or other authority, holding a formal investigation into a shipping casualty under the Merchant Shipping Acts, must, if he deals with the certificate of a master or certificated officer, give his decision in open court, yet he may, subsequently in his report to the Board of Trade, state reasons for his decision not mentioned by him at the time when the judgment was delivered.

In appeals under the Shipping Casualties Investigations Act, 1879, the Court of Appeal will not permit witnesses to be called to give evidence on questions of nautical knowledge and skill.

Where, on an appeal under the Shipping Casualties Investigations Act, 1879, the decision of the Wreck Commissioner, suspending the certificate of a master, was affirmed, but the Court of Appeal recommended that the Board of Trade should shorten the time for which the certificate had been suspended, the parties to the appeal were left to bear their own costs of the appeal.

THIS was an appeal under the 2nd section of the Shipping Casualties Investigations Act, 1879, from the decision of the Wreck Commissioner (H. C. Rothery, Esq.), with respect to the suspension for three months of the certificate of Robert Cox, master mariner. The decision appealed from was given on the conclusion of a formal investigation held at Westminster on the 25th of May, 1881, under the provisions of the Merchant Shipping Acts, into the circumstances attending the stranding of the steamship *Kestrel*, of London, and the following is a copy (omitting immaterial parts) of the report upon the case, with the annex thereto, made to the Board of Trade in pursuance of the 23rd

section of the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63).

In the matter of the formal investigation held at Westminster on the 25th of May, 1881, before H. C. Rothery, Esq., Wreck Commissioner, assisted by Captain Hight and Captain Methven, as Assessors, into the circumstances attending the stranding of the steamship *Kestrel*, of London.

REPORT OF COURT.

The Court, having carefully inquired into the circumstances of the above-mentioned shipping casualty, finds, for the reasons annexed, that the stranding of the said ship was due to the negligent navigation thereof by Robert Cox, the master, in having set and steered a course from the *Royal Sovereign* lightship so as to pass too near to the Casquets, instead of keeping her well out in mid-channel; and having thus been brought within the range of the indraught of the Race of Alderney, she was set by the current to the southward on to Burhou Island.

For these wrongful acts and defaults the Court suspends the certificate of the said Robert Cox for three months from this day.

The Court is not asked to make any order as to costs.

Dated this 25th day of May, 1881.

(Signed) H. C. Rothery,
Wreck Commissioner.

We concur in the above report.

(Signed) Eduard Hight, R. Methven, } Assessors.

ANNEX TO THE REPORT.

This case was heard at Westminster on the 25th of May, 1881, when Mr. Verney appeared for the Board of Trade, Mr. Batham for the owners, and Mr. Nelson for the master of the *Kestrel*. Six witnesses having been produced by the Board of Trade and examined, Mr. Verney handed in a statement of the questions upon which the Board of Trade desired the opinion of the Court. Mr. Nelson having produced a witness, was then heard on behalf of the master; and Mr. Verney having replied for the Board of Trade, the Court proceeded to give judgment on the questions on which its opinion had been asked. The circumstances of the case are as follows:—

The *Kestrel* is an iron screw steamship, belonging to the port of London, of 956 tons gross, and 615 tons net register, and is fitted with engines of 155 horse power. She was built at Dundee in the year 1878, and at the time of the casualty which forms the subject of the present inquiry, she was the property of the General Steam Navigation Company, Mr. Richard Cattarns, junior, being the managing owner. She left London at about 1.15 P.M. of the 14th of April last, bound to Bordeaux, with a crew of twenty-six hands all told, twenty passengers, and about 500 tons of cargo, and at about 12.40 A.M. of the following day was abreast of the *Royal Sovereign* lightship, bearing north, distant about half a mile. She was then laid upon a W. ½ S. course by the wheelhouse compass, and was kept going at full speed, making ten knots, the weather being fine, the sea smooth, and the wind light from the S.W. At about 9 A.M. there was a haze

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upon the water, with occasional patches of fog, but the vessel was continued on a W. ½ S. course, still going full speed, until 12.30 P.M., the master and chief officer being on the bridge, and a look-out man stationed forward on the top gallant forecastle, when land was suddenly observed ahead at the distance of only a ship's length, upon which the master immediately ordered the helm to be put hard aport, and signalled to the engine room to "Stop, and reverse full speed"; but they had not time to get the helm hard over before the vessel struck. The place where she had grounded was afterwards found to be on Burhou Island, a little to the westward of the Island of Alderney. As the tide was falling, all attempts to get the vessel off then proved fruitless; but no time was lost in launching the boats and in putting the passengers ashore on Burhou Island whence they were shortly afterwards transported to Alderney. At about 5.30 P.M. the same day, the tide having risen sufficiently, the vessel floated, and she was thereupon taken into Alderney. The cargo was then taken on in another ship to Bordeaux, but the vessel herself was obliged, after some temporary repairs had been done to her, to return to London, where, on being docked, it was found that she had two holes in her forehead and one in the double bottom, under the main hold, and that a portion of the keel had been knocked off.

These being the facts, the first question upon which our opinion has been asked is, "Whether, after passing the *Royal Sovereign* lightship, a due and proper course was set and steered?" It is admitted that the course set and steered from off the *Royal Sovereign* lightship was W. ½ S. by the wheelhouse compass. The master, however, told us that, owing to the deviation of the wheelhouse compass, that course would be equivalent to a west course magnetic. His evidence, however, was not quite consistent on this point; for, in the first place, the deviation card for the wheelhouse compass shewed no deviation on a west course, so that to make a west course magnetic, it would seem that he should have steered a west course by the wheelhouse compass. Again, the master stated that it was his intention to pass within eight or ten miles of the Casquets; now a W. ½ S. course magnetic would take him from eight to ten miles of the Casquets, whereas a west course magnetic would take him some twenty miles from them, which is a further proof that the course which the master intended to make was W. ½ S., and not west magnetic. Now I am advised by the assessors that a course W. ½ S. magnetic, which would take him from eight to ten miles of the Casquets, was not a proper course, and that the proper course from the *Royal Sovereign* lightship was west magnetic, which would take him some twenty miles from the Casquets, right down mid-channel, where the tide was fair up and down and clear of the indraught of the Race of Alderney. It was said by Mr. Nelson that at the distance of twenty miles the lights at the Casquets could not be seen, nor indeed would they have been visible at only eight or ten miles in the then state of the weather, there being, as we are told, a haze on the water with occasional patches of fog, which would prevent objects being seen until they were at a comparatively short distance off, Burhou Island, as we know, not having been seen until they were within a ship's length of it. The assessors are of opinion that the vessel should have been kept on a west course from the *Royal Sovereign* lightship, which would have taken them some twenty miles to the north of the Casquets, and that that was the extreme southerly limit of the vessel's proper course, and that in steering W. ½ S., so as to pass within eight or ten miles of

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those dangerous rocks, as the master says he intended to do, he was going quite out of his course.

The next question that we are asked is, "Whether those responsible for the navigation of the *Kestrel* took proper measures to ascertain her position from time to time during the morning of the 15th of April?" Within a very short time after leaving the *Royal Sovereign* lightship they would pass Beachy Head, and from that point there would be no land, and no lights to guide them. The lead, too, would not help them, as there is deep water close to Burhou Island, the same as there is in mid-channel. But this only made it the more necessary that a proper course should be set and steered from the *Royal Sovereign* lightship, a course which would take them well down mid-channel, with the tide fair up and down the channel, and out of reach of the set of the current to the south.

The third question which we are asked is, "Whether, having regard to the state of the weather, the *Kestrel* was being navigated at too great a rate of speed, and whether there was any neglect of the precautions required by the ordinary practice of seamen, or by the special circumstances of the case?" It appears to us that the master is in this dilemma: either the weather was so foggy that it was not possible to see the island until they were within a ship's length of it, and in that case he would not have been justified in going at full speed, which we are told was ten knots an hour; or it was not very foggy, and in that case, it is difficult to account for the island not having been seen until they were within a ship's length of it, unless indeed there was a very bad look-out being kept on board. In either case the master would seem to have been guilty of a neglect of the ordinary precautions required from seamen for the safe navigation of their vessels.

The fourth question upon which our opinion is asked is, "Whether the master and officers are or either of them is in default?" It is not pretended that any person other than the master is to blame for this casualty, he having been on the bridge and in charge of the vessel at the time when she ran aground. Accordingly the Board of Trade has asked that his certificate should be dealt with. We were told that this master has made the voyage from London to Bordeaux, as master, no less than eighty-one times (fifty-five times being in this vessel), and that for three years before that he had served as chief officer on board vessels running on the same line. The way in which he accounted for the casualty was this: he said that there had been five or six weeks of easterly winds, and that two days before leaving London there had been westerly winds; that the long continuance of easterly winds had drained the channel, and that with the westerly winds the water would come in with a rush, and taking the vessel on the starboard bow, as she was heading down the channel, would set her to the southward, and thus bring her within the range of the Race of Alderney. Seeing, however, that according to the master's own statement, the easterly winds had ceased, and westerly winds prevailed for two days before he left London, and that one tide would be sufficient to adjust the difference in the water levels caused by the long continued east winds, the explanation hardly appears to be satisfactory. The true cause of the casualty would rather seem to be that the master chose to lay the vessel on a course to pass too near to the Casquets, instead of keeping her at a distance of at least twenty miles from those dangerous rocks. This, too, was the more incumbent at that time, as it was very near full moon, so that the tides

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would be at their highest, and consequently the southerly set of the current through the Race of Alderney at its strongest. The assessors tell me that every book of instructions warn mariners not to approach too near to the Casquets; and bound as he was outside of Ushant, he had no right to have approached within twenty miles of them. Seeing, however, that the master appears to have behaved extremely well after the vessel struck, and that he received a certificate from the passengers speaking in high terms of his conduct after the casualty, we shall suspend his certificate for only three months.

At the conclusion of the case the master was requested to give up his certificate, but, by the advice of his solicitor, Mr. Nelson, he refused to do so, it being, Mr. Nelson stated, his intention to enter an appeal from the order of suspension.

(Signed) H. C. Rothery,
Wreck Commissioner.

We concur.

(Signed) Eduard Hight, } Assessors.
R. Methven, }

June 21. Counsel on behalf of the appellant moved the Court to order that a copy of the shorthand writer's notes of the judgment delivered by the Wreck Commissioner at the hearing of the case in the Court below be supplied to the appellant.

The motion was supported by an affidavit in which a member of the firm of solicitors retained for the appellant alleged, in effect, that he had been present during the hearing of the inquiry in the Court below and the delivery of the decision of the Wreck Commissioner; that such decision was given in open Court, and was taken down by the official shorthand writer of the Court, and that though the solicitors for the appellant had applied on behalf of the appellant to the shorthand writer and at the office of the Wreck Commissioner for a copy of the judgment as given in Court, their application had been refused. The affidavit further alleged that the solicitors for the appellant had obtained from the Board of Trade the report of the case made to the said board in pursuance of the 23rd section of the Merchant Shipping Act, 1862, and had also been supplied by the Board of Trade with a copy of a document headed "Annex to the Report," but that such document was not a copy corrected or otherwise of the judgment of the Wreck Commissioner in the case, and contained very many matters which were not in the judgment as delivered, and formed no part of the grounds or reasons as stated by the Wreck Commissioner for the suspension of the certificate of the appellant.

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Butt, Q.C., and *W. G. F. Phillimore*, in support of the motion. The 23rd section of the Merchant Shipping Act, 1862, read with the Merchant Shipping Act, 1876, provides that the Wreck Commissioner holding any investigation into a shipping casualty under the Merchant Shipping Act, 1854, "shall, at the conclusion of the case, or as soon afterwards as possible, state in open Court the decision to which he may have come with respect to . . . . suspending certificates," and the 2nd section of the Shipping Casualties Investigations Act, 1879, declares that where in any investigation into a shipping casualty "a decision" has been given with respect to the suspension of the certificate of a master, mate, or engineer, an appeal shall lie from "the decision." The expression "the decision" in these two sections is obviously used in the same sense, as meaning the judgment delivered in open Court, and the appellant's right of appeal is from that judgment, and not from the report subsequently made to the Board of Trade or the contents of any document which may be annexed to such report. If the appellant is right in this, this Court ought to assist the appellant in obtaining a copy of the judgment, especially when there are in existence shorthand notes of it taken by the official shorthand writer attached to the Court appealed from. The distinction between the report to the Board of Trade and the judgment or decision is moreover clearly shewn by the General Rules for Formal Investigations into Shipping Casualties, 1878, which contain the form of report to be followed as near as may be in every case. [They referred to the Shipping Casualties Rules, 1878, Arts. 20–22. (1)]

The Shipping Casualties (Appeal and Rehearing) Rules, 1880, (2) contemplate (art. 6, subs. g.), that in all cases the report to the Board of Trade with respect to the cancelling or suspension of a certificate should contain the decision from which the appeal is brought, and where the report does in fact contain the decision an application for the production of the judgment or decision actually delivered would be unnecessary, but where there is such a material difference between the judgment and

(1) Maude and Pollock, Merchant Shipping, 4th ed. 1881, vol. 2, p. cccclxxxii.

(2) *Ibid.* vol. 2, p. 196 (Supp. App.).

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the report, as exists in the present case, it must be in the power of the Appellate Court, apart from any express rule, to make such an order as will enable the appellant to shew what is the actual decision appealed from.

Verney, for the Board of Trade was not heard.

THE PRESIDENT. I am of opinion that this motion for the delivery to the appellant of the shorthand writer's notes of the judgment of the Wreck Commissioner must be rejected. The Wreck Commissioner was bound under the provisions of the Merchant Shipping Acts, and the 20th rule of the Shipping Casualties Rules, 1878, to state in open court the decision to which he had come with respect to suspending the appellant's certificate, but the decision is not the statement of the reasons for the decision, which need not have been given at all, though it is usual to give them. The 22nd of the Shipping Casualties Rules, 1878, provides for the form of the report to be made to the Board of Trade, and on reference to the form which is given in the Appendix to the rules it appears that the finding or decision of the Court is to be stated in the report, and in the annex to the report the opinion of the Court touching the casualty, and the reasons for which the certificate of any officer is to be cancelled or suspended. Now, in this case the opinion of the Wreck Commissioner as to the cause of the casualty and the reasons for which he suspended the appellant's certificate are stated in the annex to the report, but the appellant complains that the reasons given in the annex to the report are not the same reasons which were given when the oral judgment in the case was delivered. The appellant wishes to refer to the reasons the Wreck Commissioner gave for his decision when he delivered his judgment in Court, but whether it be or be not the case that some reasons were then given which the Wreck Commissioner had afterwards reason to suppose were not sound ones, we, as an Appellate Court, must decide the case on the evidence with such assistance as the report may afford us. If the judge of the Court below has in the report left out any reasons which might have seemed to him to have been bad or insufficient, and has in their stead stated good reasons, it was clearly open for him to do so.

SIR ROBERT PHILLIMORE. I am of the same opinion, and I have no doubt on the subject.

June 27. The appeal was heard. The Court (The President, Sir Robert Phillimore) was assisted by two of the Elder Brethren of the Trinity House.

Butt, Q.C., and *W. G. F. Phillimore*, for the appellant, proposed to call and examine witnesses to give evidence as to the usual course to pass clear of the Casquets, which would, in ordinary circumstances, be set and steered from the *Royal Sovereign* lightship. (1)

Middleton and *Verney*, for the Board of Trade. The evidence it is proposed to give is inadmissible. The Court is assisted by nautical assessors, and it is their province to advise the Court on matters of nautical skill and knowledge.

SIR ROBERT PHILLIMORE. In cases in the Admiralty Division, where Trinity Masters attended, I should refuse to admit evidence of a similar character.

THE PRESIDENT. I have been informed what the practice of the Admiralty Division is with respect to evidence of this kind, and it commends itself to my judgment, and I think that we ought to adopt it in these appeals. We have nautical assessors whose duty it is to advise us in these matters, and apart from other objections I can conceive that the admission of such evidence would inconveniently add to the length of the hearing in these cases. We refuse to allow the proposed witnesses to be called.

The appeal was then heard on the evidence taken in the Court below. The arguments appear from the judgments.

THE PRESIDENT. I should have desired for personal and other reasons to have taken a little time to put my judgment into better shape than I can do now, but having regard to the fact

(1) The appellant had previously applied for and obtained leave to adduce fresh evidence at the hearing of the appeal.

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that the master is kept in a state of suspense as to whether or not his certificate shall be kept from him, and as my learned colleague and myself are agreed upon the principle on which our decision is to proceed, I give my judgment and the reasons without further delay. Now there is a subsidiary question here as to what is the decision from which the appeal takes place, that undoubtedly may under some circumstances be a question of considerable importance. It seems to me that it would be a great hardship upon the master if the decision were limited to a simple finding, that he had been guilty of wrongful acts and defaults, for which his certificate was suspended. It has been contended that the statute would be complied with, if the decision contained no more than that. But it is not necessary for us to determine whether it be so or not, because there can be no doubt that if the report as distinguished from the annex to the report is right, it contains a finding that the master had been guilty of particular wrongful acts and defaults, namely, "in having set and steered a course from the *Royal Sovereign* lightship, so as to pass too near to the Casquets, instead of keeping her well out in mid-channel; and having thus been brought within the range of the in-draught of the Race of Alderney, the vessel was set by the current to the southward on to Burhou Island."

Now we have come to the conclusion upon the advice, as to certain questions of fact which I shall mention presently, given to us by the assessors, that the master was guilty of a wrongful act and default in steering; that is to say, in continuing to steer a W. $\frac{1}{2}$ S. course from the *Royal Sovereign* lightship, instead of keeping the vessel well out in mid-channel. An attempt has been made to put a construction upon the language used by the Wreck Commissioner in the annex to his report; and it has been argued (and if the argument can be sustained, it leads to an absurdity) that the commissioner meant to say that under no possible circumstances, whether in broad daylight, smooth water, and freedom from haze, was it safe to go at a less distance than twenty miles from the Casquets, but that appears to me an entirely forced construction of the language of the learned Commissioner. What he was directing his attention to, was the fact that this vessel (which the master says he was steering on a course which

he thought, and had a right to think, would take him seven or eight miles in one point of view, and in another point of view twenty miles from the Casquets) was being navigated in a fog. Then the justification which the master intends to put forth, is clearly this, "I had such reasons to believe this was a safe course, that there was no necessity for me (though there was a fog) to make any deviation in my course or slacken the speed at which I was going." It is with reference to that supposed contention of the master, that the decision of the Wreck Commissioner was given, and that decision, in my opinion, amounts to this, that a W. ½ S. course was not a proper course to steer, if it was to be persisted in under all the circumstances of weather or otherwise. Now, we are advised by the assessors that they are of opinion that this was not a wrong course generally to set because, if it were fine weather, it would in the ordinary course of things have brought the master within sight of the Casquets. But we are advised that, though in clear weather it might have been right for him to steer upon that course, it was not right for him to continue that course during fog and at the speed he did. Then with regard to the actual facts of the accident, we are advised that having regard to the state of the weather, the *Kestrel* was being navigated at too great a speed, and that this was a contributory cause to the disaster. I am, therefore, of opinion that not merely has the master been guilty of a wrongful act in navigating this vessel in the state of the weather which existed on this morning at such a rate of speed, but that he has also been guilty of a wrongful act within the meaning of the report in this case, in that he continued to steer the course he did in a fog. It is obvious that the only reason why the distance of seven or eight miles is given as a safe course to steer clear of the Casquets, is that sufficient allowance should be made for contingencies. What is a sufficient offing in each case, is of course a question of degree. The question we have to consider, is whether the master had a right to persist in his course, although the circumstances had been so materially altered by the rising of the fog. Now, I cannot say the Wreck Commissioner was wrong, and indeed, in my opinion, he was right in the view he took. For these reasons, I am of opinion, and my learned Brother agrees with me, that the

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decision of the Wreck Commissioner must be affirmed. But he is of opinion, and I see no reason to differ from him, that the punishment was more severe than the circumstances called for. We, therefore, recommend that the remainder of the suspension be remitted by the Board of Trade, seeing that the master has already had his certificate suspended for a month or thereabouts, and that that is a sufficient punishment to mark the extent of the indiscretion and wrongful act of which we think he has been guilty.

In case there should be any difficulty as to effect being given to the suggestion we have made, the matter may be mentioned to the Court again. I think under the particular circumstances of this case, namely, that we have considered that the sentence was more severe than the circumstances called for, and that, therefore, to that extent the appeal may be said to have been successful, it is a case in which there should be no costs on either side.

SIR ROBERT PHILLIMORE. I have nothing to add. I agree in the judgment which the President has delivered, for the same reasons that have been given.

Solicitors for appellant: *Lawless & Co.*

Solicitor for respondent: *Solicitor for the Board of Trade.*

G. B.

THE KILLEENA. (1880 B. 4456. Fo. 351. 1880 N. 943. Fo. 353. 1880 A. 902. Fo. 394.) 1881 *March* 9.

Salvage—Abandonment of Derelict by Salvors—Waiver of Salvage—Remuneration—Amount of Award.

The barque *N.* fell in with the *K.*, a derelict barque, in the Atlantic, and put five hands on board of her who navigated her for three days. The *K.* then fell in with the barque *B.*, and the five hands on board of the *K.* were, at their own request, taken on board the *B.* The *B.* then sent some of her own crew on board the *K.*, and took her in tow, and towed her until the tow-rope broke, when the vessels parted company, and the hands on board the *K.*, with the assistance of the *L.*, a steamship which they afterwards fell in with, brought the *K.* into Falmouth. In suits instituted on behalf of the masters, owners, and crews of the *N.*, the *B.*, and the *L.*, the Court held, that the master, owners, and crew of the *N.* were not entitled to salvage reward, but awarded salvage to the remaining plaintiffs.

THERE were three consolidated actions of salvage instituted, one on behalf of the owners, master, and crew of the barque *Beatrice;* the second on behalf of the owners, master, and crew of the Norwegian barque *Nora;* and the third on behalf of the owners, master, and crew of the German screw steamship *Leipzig;* against the owners of the barque *Killeena*, her cargo, and freight. Two statements of claim were delivered in the consolidated actions, one on behalf of the owners, master, and crew of the *Leipzig*, and the other on behalf of the owners, masters, and crews of the *Beatrice* and the *Nora*. The first five paragraphs of this latter statement of claim were, so far as material, as follows:—

1. The *Beatrice* is of 521 tons register, and at the time of rendering the services hereinafter mentioned, was on a voyage from North Shields to Philadelphia, laden with a general cargo and manned by a crew of eleven hands.

2. At about 11 A.M. on the 15th of October, 1880, the *Beatrice* was in about latitude 48° 6′ N. and longitude 12° 16′ W. The wind at such time was about east, blowing a moderate breeze, and the weather was fine.

3. At such time, a vessel, which proved to be the barque *Killeena*, the vessel proceeded against in this action, was seen from the *Beatrice* at the distance of about four miles, with her ensign flying at her gaff, with union down.

4. The *Beatrice* thereupon bore down upon her and was steered to pass close to the *Killeena*, and on so passing the vessel was hailed, and asked if she wanted assistance, and the reply was, "We want to be taken off."

5. The *Beatrice* was immediately hove-to, and her boat, in charge of Martin Cunningham her boatswain, and manned by the plaintiff Damble, A.B., and two

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other seamen of the *Beatrice*, was lowered and sent alongside the *Killeena*. When the boat of the *Beatrice* arrived alongside the *Killeena*, the plaintiffs Cunningham and Damble, boarded her, and found five Norwegians on board her. The Norwegians were part of the crew of a Norwegian barque called the *Nora*, a vessel of 783 tons register. On the 12th of the said month of October, the *Nora*, which was proceeding from Quebec to Barrow, with a cargo of deals and had a crew of sixteen hands, all told, had fallen in with the *Killeena*, which had then been abandoned by her master and crew, and had put the said five of her men on board the *Killeena*. The said five men had rigged up a jury-mast and had got sail on the *Killeena*, and had used their best endeavours to save the *Killeena*, and had suffered considerable hardships whilst so doing. The *Nora*, after keeping in company with the *Killeena* for some hours, had proceeded on her voyage. The Norwegians requested to be taken off the *Killeena*, and refused to remain on board her, and they and their effects were transferred to the *Beatrice* by her boat. The plaintiffs Cunningham and Damble remained on board the *Killeena*. The *Nora*, when, as aforesaid, her second mate, carpenter, and three others of her crew were put on board the *Killeena*, was in a damaged condition and exposed to great peril in consequence of the wind and sea. Her rudder had been broken, and was only roughly repaired, and she was therefore steering badly. The *Nora* also had such a serious list that the men who went on board the *Killeena* were able to step down from the *Nora's* bulwarks into their boat. By thus parting with five hands out of an available crew of sixteen, the safety of the *Nora* in damaged condition was seriously threatened, and her master took upon himself a heavy responsibility in so parting with his hands, and the labour of such of the crew of the *Nora* as remained on board their vessel was very materially increased, and they suffered great hardship by reason thereof. The master of the *Nora* gave to those men who boarded the *Killeena* every information as to their position and also provided them with a sextant and a pair of sidelights, only reserving for himself one set of sidelights, the glass of one of these being broken and the efficacy of the light greatly impaired thereby. The carpenter was also allowed to take with him his tools, and by parting with the carpenter the *Nora* in her disabled condition, was liable to be subjected to still greater peril. Those of the *Nora's* crew who went on board the *Killeena* did their utmost to get the vessel under command, and by assuming charge of her removed a great danger to the general navigation.

The statement of claim delivered on behalf of the owners, masters, and crews of the *Beatrice* and the *Nora*, further alleged that after two more of the crew of the *Beatrice* had gone on board the *Killeena* to assist the boatswain and the able seamen from the *Beatrice* already on board her, the *Beatrice* succeeded in taking the *Killeena* in tow and towed in the direction of Queenstown until the evening of the 19th of October, when the tow-rope parted; that the two vessels remained in company until the 27th of October, and that from that date the four hands on board the *Killeena* were left to their own resources and worked the vessel

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successfully and without assistance until the 9th of November, when the *Leipzig* fell in with her and took her in tow.

The statement of claim delivered on behalf of the owners, master, and crew of the *Leipzig* alleged, inter alia, that the *Leipzig*, belonging to the North German Lloyd's, on a voyage from Baltimore to Bremen, with a crew of sixty-seven hands, twenty-four passengers, the mails, and a valuable cargo, fell in with the *Killeena* in latitude 49° 23′ N. and longitude 14° 15′ W., and at the request of those in charge of her took her in tow and towed her to the entrance of Falmouth harbour, the two vessels arriving off that port on the evening of the 12th of November, and that during the service the hawsers and boats of the *Leipzig* were damaged to the extent of 70*l.*, and the owners of the *Leipzig* incurred, by reason of the service and the detention of the *Leipzig* at Falmouth, certain other expenses amounting to about 200*l.*

The defendants, the owners of the *Killeena*, and the owners of her cargo, delivered one statement of defence in the consolidated actions. The first six paragraphs of this statement of defence contained the following allegations:—

1. The *Killeena*, a barque of 795 tons register, and built of iron, left New York on the 26th of August, 1880, bound for Liverpool, laden with a cargo of 1160 tons of Indian corn and 389 bales of cotton, and manned by a crew of eighteen hands all told.

2. On the 6th of October, whilst the *Killeena* was on the said voyage, she encountered a heavy gale of wind, and took so heavy a list to port, that the master caused the mainmast, and subsequently the foremast, to be cut away in order, if possible, to right the ship, the mizen topmast was also carried away. Although the *Killeena* righted somewhat when relieved of her masts, and notwithstanding that the weather having moderated, steps were taken by the master and crew to trim the cargo, the ship still continued to have a heavy list to port.

3. Finding that the ship was unmanageable, and could not be navigated into port without steam assistance, which was not forthcoming, and fearing the effect of another gale, which was threatening, the master and crew on the 9th of October abandoned the barque. The *Killeena* at the time of the abandonment was in latitude 48° 10′ N. and longitude 15° 54′ W. The hull of the *Killeena* was not damaged below the deck, and she was making no water except some small quantities which got down from slight damage to the mast holes, which the master had repaired as far as was possible.

4. On the 12th of October the *Killeena* was sighted by the Norwegian ship *Nora*, who put a crew of five hands on board the *Killeena*, and the two vessels

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parted company. The defendants admit that the men from the *Nora* rigged a small jury mast and made attempts to get sail on the ship to get her under command, which were unsuccessful.

5. On the 15th of October the said attempted salvors from the *Nora* finding that their efforts to salve the *Killeena* and her cargo were perfectly futile, hoisted an ensign, union down, to attract passing vessels, in order that they might be taken off the *Killeena* and abandon any further attempt to bring her into safety.

6. The barque *Beatrice* bore down upon the *Killeena* in answer to the said signals, and at their request took off the said Norwegian salvage crew, who thereupon abandoned their attempts to salve the said barque and her cargo.

The consolidated actions were heard before the judge, assisted by two of the Elder Brethren of the Trinity House. Witnesses on behalf of the plaintiffs were examined orally in court. The result of their evidence, so far as is material, is stated in the judgment. No witnesses were called for the defendants, but it was admitted that the total value of the property salved amounted to 12,663*l.*

Webster, Q.C., and *W. G. F. Phillimore*, for the owners, master, and crew of the *Leipzig*.

E. C. Clarkson, and *McLeod*, for the owners, master, and crew of the *Beatrice*.

J. P. Aspinall, for the owners, master, and crew of the *Nora*. The owners, master, and crew of the *Nora* are entitled to participate as salvors in whatever salvage award the Court may make in this case. The master of the *Nora* incurred great responsibility in sending so many of his crew on board the *Killeena*, and the services of the men sent on board in navigating the *Killeena* until she fell in with the *Beatrice*, materially contributed to the ultimate preservation of the vessel and her cargo: *The Undaunted.* (1)

[SIR ROBERT PHILLIMORE. Assume that the services of the men from the *Nora* contributed to some extent to the saving of the *Killeena*, the question still remains whether, having quitted the *Killeena* sine animo revertendi, they are not to be considered in the circumstances as having abandoned any rights to salvage reward that they might otherwise have successfully asserted here.]

Cohen, Q.C., and *Myburgh*, for the defendants. The action

(1) Lush. 90.

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brought by the owners, master, and crew of the *Nora* ought to be dismissed with costs. The men put on board the *Killeena* from the *Nora* not only deserted the *Killeena* sine animo revertendi, thus voluntarily giving up all their interest in her, together with any rights to salvage reward to which they might otherwise have become entitled, but at the time they abandoned the vessel they did not even know that any attempt to salve her would be made on behalf of the *Beatrice*. The case therefore must be treated exactly as if the *Killeena* had been still a derelict at the time when the men from the *Beatrice* boarded her. [They referred to *The Yonge Bastiaan*. (1)]

SIR ROBERT PHILLIMORE. This is a case of salvage service rendered to a vessel which was abandoned by her master and crew. The *Killeena* was a barque of 795 tons, and left New York on the 26th of August last year, bound to Liverpool with a cargo of Indian corn and cotton. On the 6th of October she encountered a heavy gale, and took so heavy a list to port that her master caused the mainmast and the foremast to be cut away, and finding that she became unmanageable and could not be navigated, her master and those on board left her, and on the 9th of October she was abandoned. She drifted about in the Atlantic Ocean until the 12th of that month, when she was sighted by a Norwegian ship called the *Nora*, from which a crew of five hands was put on board her. On the 15th of October the men who went on board from the *Nora* became frightened, and determined to abandon the vessel, and they hoisted an ensign, union down, and that attracted the attention of those on board the *Beatrice*. Here a most important question arises, whether the owners, master, and crew of the *Nora* are entitled to anything for their services. Now the principles of law applicable to the question are laid down in the case of *The Undaunted* (2), where is to be found the following passage:—

> Salvors who volunteer, go out at their own risk for the chance of earning reward, and if they labour unsuccessfully, are entitled to nothing. The effectual

(1) 5 C. Rob. 323. (2) Lush. 90.

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performance of salvage service is that which gives them a title to salvage remuneration. But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labour and service may not prove beneficial to the vessel.

Now, there is no doubt that where a set of salvors have done some acts which tend to the ultimate salvage of a vessel they are usually entitled to some remuneration, but there is a circumstance in this case most material to consider. The four men and the boy who were put on board from the *Nora* deliberately, according to the evidence, when the *Beatrice* had answered their signal, abandoned and deserted the *Killeena*. It appears to me, therefore, that the *Killeena* was again a derelict vessel. As the men on board her deliberately determined to leave her, four men were found with better heart and courage to take the places of these men, and to do what was necessary for the preservation of the *Killeena*. It seems to me that the words of Lord Stowell, in *The Yonge Bastiaan* (1), are material to this case. That was a case of salvage, and Lord Stowell in delivering judgment said:

> It appears that the vessel was stuck fast upon a rock, with her bottom beaten in and her rudder lost, when the first salvors went to her assistance, in a very heavy sea, and succeeded in warping her off. She sank afterwards it was true; but it is not on that account to be said that the first salvors had lost her again, or that they had abandoned their interest in her. They did not stay by the vessel; but it cannot be supposed that having risked so much for her recovery they meant to desert her, whilst others were employed in their sight in weighing her up, and in saving the cargo.

Now that was the reverse of this case. Here the men from the *Nora* did not stay by the vessel, and they had not the slightest intention of assisting her. It appears to me that it would be contrary to the principles upon which salvage remuneration is awarded, to allow the *Nora's* people to appear as salvors in this case, inasmuch as they were, according to the evidence, turning their backs and running away from the danger to which the vessel was exposed. The men from on board the *Beatrice* had as much reason to be alarmed, but they persevered, and their courage deserves to be rewarded. I am clearly of opinion that the owners, master, and crew of the *Nora*, are not entitled to claim salvage

(1) 5 C. Rob. 324.

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remuneration in this case. There are two other vessels—the *Beatrice* and the *Leipzig*—whose services have to be considered. The *Beatrice* towed the *Killeena* from the 15th to the 19th of October, and then stood by her until the 26th of October, but lost sight of her upon the 27th of October. The *Leipzig* on the 9th of November spoke the *Killeena* and offered her services, which were accepted, and after a towage of two days and six hours the *Killeena* was brought safely into harbour, and thereby very valuable assistance was rendered. The first thing the Court has to consider is, what is the total value out of which these services are to be rewarded to the salvors. The value of the property salved is 12,663*l.*, and out of that I shall make a total award of 4200*l.* The *Beatrice* ran great risk in order to save this vessel, and deviated from her course, being thus delayed in the performance of her voyage. Out of this award I shall apportion to the owners, master, and crew of the *Leipzig* 1200*l.*, and the remaining 3000*l.* to the *Beatrice*, to be distributed as follows: 300*l.* to the master of the *Beatrice*, 1200*l.* among the four men placed on board the *Killeena*, of whom the plaintiff Cunningham is to have a double share, 200*l.* to the rest of the crew of the *Beatrice*, and 1300*l.* to the owners of the *Beatrice*.

Solicitors for owners, master, and crew of the *Leipzig*: *Clarkson & Co.*

Solicitors for remaining plaintiffs: *Stokes, Saunders, & Stokes.*

Solicitors for defendants: *Cooper & Co.*

G. B.

1881
July 19.

THE JOHN McINTYRE. (1881 J. No. 917, Fo. 238.)

Limitation of Liability—Merchant Shipping Act, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*Limit of Liability dependent upon Tonnage of Ship at time of Collision.*

In a suit of limitation of liability in respect of damage arising from a collision, the shipowners claimed deductions on account of crew space which appeared on the register of their vessel at the time of their application for a decree:—

Held, that they were not entitled to the benefit of any deductions not appearing on the register in force at the time of the collision.

THIS was an action of limitation of liability instituted on the 3rd of June, 1881, on behalf of the owners of the British steamship *John McIntyre*, for the purpose of limiting their liability in respect of the damage arising out of a collision which occurred without the actual fault or privity of the plaintiffs, but owing to the negligence of their servants, between the *John McIntyre* and the steamship *John Ormston*, on the 11th of February, 1881.

No loss of life or personal injury was caused by the collision.

The plaintiffs, in their statement of claim, after alleging that the gross tonnage of the *John McIntyre*, without deduction on account of engine-room, was 946·61 tons, claimed, inter alia, a declaration that they were not answerable in respect of loss or damage caused by the *John McIntyre*, to an aggregate amount exceeding 8*l.* for each ton of the gross tonnage of the *John McIntyre*, without deduction on account of engine-room.

The owners of the *John Ormston*, and the owners of her cargo, having appeared in the action as defendants, required proof of the gross tonnage of the *John McIntyre*.

In support of the allegations in the statement of claim, the solicitors for the plaintiffs brought in an affidavit, to which there was annexed as an exhibit, a copy of the register of the *John McIntyre*.

From such copy register it appeared that the *John McIntyre* had been built in 1863, and had been first registered on the 15th of September in that year; that at that time the details of her tonnage were:—Tonnage under tonnage deck 925·11, break

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59·64, deductions allowed for propelling power 187·14, registered tonnage 797·$\frac{61}{100}$; that in accordance with a certificate of survey dated 14th of July, 1875, her gross tonnage had been altered to 984·75, and her registered tonnage (in consequence of an increased allowance in respect of space for propelling power) to 315·12. It further appeared from such copy register that on an allowance for crew space per Board of Trade survey dated the 27th of June, 1881, the tonnage of the *John McIntyre* had been again altered, and that the details of her tonnage as so altered were as follows:—

		No. of tons
Gross tonnage:		
Under tonnage deck		925·11
Closed in space above the tonnage deck (if any)		
Round house		6·12
Break		59·64
Gross tonnage		990·87
Deductions:		
On account of space for propelling power	317·18	
On account of spaces occupied by seamen. Berthing of officers and crew on deck house and below .	44·26	
Total deductions . . .		361·34
Registered tonnage . . .		629·53

It appeared that no structural alterations had been made in the ship since the date of the collision, although some additional provisions had been made for the ventilation of the crew space.

July 19. The action was heard before the judge in Court.

G. Bruce, for the plaintiffs. The tonnage which regulates the liability of the shipowner in an action for limitation of liability, is the tonnage of the ship according to the register in force at the date of the application for the decree. If the tonnage of the ship had been increased between the date of the collision and the

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present time, can it be said that the owners would not have been liable to the extent of the increased tonnage? The same principle must be applied whether the tonnage be increased or diminished, and in the present case there is nothing unreasonable in the contention of the plaintiffs, because no structural alteration has taken place in the ship, and the right to claim the deduction on account of crew space depended simply upon the observance of formal requirements which in no way affected the value of the ship.

W. G. F. Phillimore, for the defendants. If the plaintiffs are right and the "tonnage" referred to in the 54th section of the Merchant Shipping Act, 1862, is the "tonnage" at the date of the application for the order limiting the plaintiffs' liability, the result would be that in cases like the present it would be in the power of a plaintiff by delaying to proceed with his action to diminish the amount of damages recoverable by the defendants. The right of the defendants to recover the damage attached at the time of the collision, and it is from the date of the collision that interest on the sum recovered is due: *The Northumbria.* (1) It must follow that the tonnage, by calculation from which the amount recoverable is to be ascertained, is the tonnage of the wrongdoing vessel at the time of the collision, and if so, the only proper evidence of what that tonnage was is, in the case of a British registered ship, the certificate of registry under which she was sailing when the collision occurred.

G. Bruce, in reply.

SIR ROBERT PHILLIMORE. The only question the Court has to decide is whether the tonnage of the *John McIntyre* at the time of the collision or her tonnage at any subsequent date, is to be taken as affording the basis for computing the limit of the liability of her owners in this action. Now the plaintiffs were wrongdoers from the moment of collision, and their liability must depend on the state of things then existing. I think that the tonnage on which the limit of the plaintiffs' liability is to be calculated is the "tonnage," that is the gross tonnage without deduction of engine-room, taken from the certificate of registry

(1) Law Rep. 3 A. & E. 6.

which states what was the registered tonnage of the *John McIntyre* at the time when the collision occurred. 1881

THE JOHN MCINTYRE.

Solicitors for plaintiffs: *Gellatly, Son & Warton.*

Solicitors for defendants: *Cooper & Co.*

G. B.

IN THE GOODS OF PERCY ALFRED ECCLES ASTON. *April 27.*

Will—Gift of Residue—"Money, Stocks, Funds, or other Securities."

A gift of "such money, stocks, funds, or other securities, not hereafter specially devised, as I may die possessed of," does not constitute a gift of residue.

PERCY ALFRED ECCLES ASTON, late of No. 3, Dean's Yard, Westminster, stock jobber, deceased, died on the 23rd of February, 1881.

By his will, dated the 17th day of January, 1880, he appointed executors, but named no residuary legatee unless in the following words, viz.:—

"Also to my father, Joseph Keech Aston, a life interest, or until he marry again, of one-third of such money, stocks, funds, or other securities, not hereafter specially devised, as I may die possessed of, such portion of my capital to be invested . . . . The other two-thirds of my capital, not otherwise hereafter specially devised, I give to such of my brothers and sisters as shall attain twenty-one years . . . . and on the death of my father, or his second marriage, the one-third . . . . and also my share of the money of my late mother which then comes to me to be divided amongst my brothers and sisters."

The executors renounced probate of the will, and

E. Thurston Holland asked that a grant of letters of administration with the will annexed might be made to the father as next of kin.

The words are not sufficient to constitute a gift of residue: Jarman on Wills (3rd ed.), 730, note; *Lowe* v. *Thomas* (1); *Williams* v. *Williams* (2); *Byrom* v. *Brandreth* (3); *Hopkins* v. *Abbott.* (4)

(1) 5 D. M. & G. 315 (3) Law Rep. 16 Eq. 475.
(2) 8 Ch. D. 789. (4) Law Rep. 19 Eq. 222.

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IN THE GOODS OF ASTON.

THE PRESIDENT. The grant may be made to the next of kin with a memorandum (which I am informed is according to the usual practice) that the grant is so made as there is no clear disposition of the residue.

Solicitors: *Withall & Compton.*

R. A. P.

May 3.

IN THE GOODS OF J. HATTON.

Will—Mistake—Duplicate—Execution.

An intended will was written in duplicate, one copy of which was signed only by the deceased and the other only by the attesting witnesses:—

Held, that neither paper was entitled to probate.

JOHN HATTON, late of Ibstock, in the county of Leicester, tailor, died on the 29th of November, 1876.

On the 24th of February, 1876, the deceased called in two neighbours, viz., William Evitt and John William Hopkins, in order that he might make his will in their presence. William Evitt, upon the deceased's directions, wrote out a short will, leaving all the property to the deceased's wife and appointing her sole executrix. After this had been done, J. William Hopkins, thinking the language of the will might be improved, wrote out another will in other words, but to the same effect. The deceased then signed the first paper, but the witnesses signed the second paper.

Searle moved the Court for probate of both papers: *In the Goods of Braddock.* (1)

THE PRESIDENT. A will may be composed of numerous papers, which together make but one instrument; but these are separate and independent documents. I am always desirous of correcting error if possible so as to carry out the intentions of a testator, but in this case the names of the testator and the witnesses are on separate papers, and the requirements of the law have not been fulfilled. I must therefore refuse probate.

Solicitors: *F. J. & G. J. Braikenridge.*

(1) Law Rep. 1 P. D. 433.

R. A. P.

IN THE GOODS OF STEDHAM.
IN THE GOODS OF DYKE.

1881
May 10.

Will—Mistake—Revival—Revocation.

A testator made a will, and afterwards another, which by implication revoked the former will. Subsequently, by the terms of a duly executed codicil, he by mistake, referred to the former instead of the later will:—

Held, that the codicil by its language, revived the former will, and that as the later will was not revoked by the codicil all three documents must be admitted to probate.

JOHN STEDHAM, late of Axminster, in the county of Devon, builder, deceased, died on the 23rd day of January, 1881.

The deceased had made two wills, one dated the 21st day of May, 1877, and the other the 13th of February, 1878. Each will was made by the same solicitor, who kept them in his safe. On the 24th day of January, 1880, the solicitor prepared a codicil for the deceased, which by mistake commenced with the words "This is a codicil to my will, which bears date the 21st day of May, 1877," thereby referring to the former instead of the later will. The mistake was not noticed at the time, and the codicil was duly executed and attested.

April 27. *Bayford*, for the executors, asked for probate of the will of the 13th of February, 1878, and codicil: *In the Goods of Steele* (1), *In the Goods of Ince.* (2)

Cur. adv. vult.

May 10. THE PRESIDENT. In this case the testator made a will on the 21st of May, 1877, by which, after making certain specific gifts to each of his six children, he directed that the residue of his real and personal estate should be sold and divided equally amongst his six children. By a subsequent will of the 13th of February, 1878, he directed that all his property real and personal, should be disposed of and divided equally amongst his six children, but with a direction that as to two of them certain arrears of rent that had accrued to him from them should be

(1) Law Rep. 1 P. & D. 575. (2) 2 P. D. 111.

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IN THE GOODS OF STEDHAM.

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deducted from their shares. In January, 1880, he proposed to make a codicil, the effect of which was to deprive those two children who were in arrear of rent, as appeared from the previous will, of all share in his property, and to direct that the whole should be divided into four shares instead of six. The solicitor who was instructed to prepare this codicil, instead of making a codicil to the will of 1878, made a codicil to the will of the 21st of May, 1877, and I was asked to treat it as a mere mistake as to the date and to allow probate of the codicil together with the last will of February, 1878. I am unable to do so, for this reason; that it was not a mere mistake as to the date of the will to which it was intended to append the codicil, but the mind of the solicitor, which must be treated as that of the testator, was actually applied to the provisions of the will of 1877, and he employed the terms and language of that will of 1877 so as to mould it into an expression of what the testator's intention and wishes were at the time of the making of the codicil, and if I were to allow probate of the codicil together with the will of 1878, it would be introducing nonsense into the two instruments, for it would make the codicil refer to provisions in a will, which, when the will is looked at, would not be found in it.

It is always extremely difficult to apply any principles of law to a gross blunder, but having given the case the best consideration I can, I have come to this conclusion, that the codicil thus referring to the will of 1877, so far confirms, and brings that will into existence, that it must form part of the probate in order that the codicil may have an interpretation put upon it; and that as the will of 1878 does contain also the most important of the testamentary dispositions which the testator has made and which have never been revoked, the will of 1878 must also be admitted to probate.

The three documents, therefore, the will of 1877, and the will of 1878, and the codicil, must all in their order of date be admitted to probate, and the general intent to be collected from the three instruments will then become the subject of consideration, if necessary, for a court of construction; but in order to prevent litigation, I may say that the interpretation I should put upon these three instruments is that the two children have been entirely

excluded from the testamentary dispositions of the testator, and the whole of the property is to be divided amongst the other four children. (1)

1881

IN THE GOODS OF STEDHAM.

IN THE GOODS OF DYKE.

Solicitor: *Edward F. Sealy.*

R. A. P.

IN THE GOODS OF DYKE.

May 31.

FRANCIS DYKE, late of Ballingham, in the county of Hereford, farmer, deceased, died on the 30th day of June, 1880.

He had made a will dated the 29th day of October, 1878, which he revoked by a will dated the 9th day of November, 1878.

By the will of the 29th of October, 1878, he gave (amongst other bequests) the interest of 300*l.* to his daughter Elizabeth Cooke for life, and after her death amongst her children, and he also gave her 100*l.* absolutely, and appointed William Davies and Edwin Corfield, executors.

By the will of the 9th of November, 1878, he gave (amongst other bequests) after the death of his wife, 400*l.* in trust for the children of his daughter Elizabeth Cooke, and appointed the same executors, and revoked all previous wills.

The first will was, about nine months before his death, given by the deceased to Richard Owens, a neighbour, to take care of. The second remained in the custody of the solicitor who prepared it.

On the 9th day of June, 1880, the deceased, being desirous of making some alteration in his will, sent his son to Richard Owens for the first will, and a Mr. Henry Cooke, from instructions given to him verbally by the deceased, drew a codicil to the first will, which was produced to him for the purpose, and the codicil was then executed.

In the codicil, which professed in its terms to be a codicil to the first will and referred to it by its date, the legacies of 100*l.* and of the interest of 300*l.* to his daughter Elizabeth Cooke were recited and revoked, and in lieu thereof, the deceased gave her children 100*l.* He also revoked the appointment of Edwin Corfield as executor, and instead appointed his son executor

(1) See next case.

1881

IN THE GOODS OF DYKE.

jointly with William Davies, and in all other respects confirmed his said will. No mention either before or after the execution of the codicil was made of the second will.

All the parties who were sui juris and the parents of the minors had notice of the motion.

Bayford, for the executors, applied for probate of one or other of the wills together with the codicil.

THE PRESIDENT. Where a simple mistake has been made as to the date of an instrument, the mistake can be set right: but in a case like this where the mind of the draftsman, whether the testator himself, or some one employed by him, has been really applied to the words of a particular instrument, it is impossible for me to say that it was by mistake that that instrument was referred to instead of another. It is plain that that was the actual instrument which the then draftsman had in his mind, and it is not possible to avoid the conclusion that the codicil which purports to be a codicil to the will of the 29th of October, 1878, and which, after making certain alterations, confirms that will in all respects does revive that will. But has it by implication revoked the intermediate instrument of the 9th of November, 1878? It does not do so in terms, or except where it deals with the same subject-matter. The result, therefore, seems to be that in consequence of the unfortunate error which has been fallen into, I must grant probate of all three instruments, and leave it to a court of construction to interpret them together.

Solicitors: *Jones & Starling.*

R. A. P.

IN THE GOODS OF ELIZABETH TOMLINSON.

1881
May 24.

Married Woman — Will of Realty — Appointment of Executors — Probate — Jurisdiction — Judicature Acts.

A will of a married woman made during coverture, under a power and disposing of real property only, is not entitled to probate, though there is an appointment of executors.

The Judicature Acts do not alter the jurisdiction of the Court of Probate in non-contentious matters.

7 PD 61

Elizabeth Tomlinson, wife of Edward Tomlinson, died on the 14th day of December, 1872.

By an ante-nuptial settlement, dated the 17th of September, 1850, certain real estate was conveyed to trustees upon trust to pay the annual proceeds to the deceased for life, and if there should be no child of the marriage, then upon such trusts as she should by her last will or codicil appoint. The deceased during the lifetime of her husband, made her will, dated the 13th day of May, 1868, and a codicil, dated the 20th day of July, 1871, and thereby appointed executors and directed the trustees to sell the real estate and stand possessed of the proceeds in trust for her husband for life, and after his death to pay certain legacies and divide the residue.

There were no children of the marriage, and Edward Tomlinson, the husband, died on the 21st day of November, 1880.

Asheton Cross, for the executors, moved for probate of the will.

Cur. adv. vult.

The President, after stating the facts, said:—It was argued before me that as this will appointed executors it was entitled to probate in any case; and it was further argued that as the will by implication directed the sale of the real estate, it was therefore to be treated as personalty. I expressed an opinion at the time, and still think that it might perhaps be convenient if all instruments purporting to be testamentary should be admitted to probate, but I am not entitled upon any ground of convenience to assume a jurisdiction which does not belong to me, and I am of opinion that I have no jurisdiction to admit this instrument to probate.

1881

IN THE GOODS OF TOMLINSON.

Where the will is of a man or a feme sole, the appointment of an executor has been held sufficient to entitle the will to proof; but where it is the case of a married woman executing a power by will, different considerations arise. Though it is in the form of a will as required by the instrument giving the power, it is in fact a conveyance by means of the appointment exercised, and although an executor is appointed the executor takes nothing in his character of personal representative. It was upon that ground that Sir Cresswell Cresswell, in an exactly similar case—*O'Dwyer* v. *Geare* (1)—refused to admit to probate the will of a married woman in execution of a power which related only to real estate, and the same question was before Lord Penzance in the case of the *Goods of Jane Barden.* (2) It was suggested that a subsequent decision of Lord Penzance in the case of the *Goods of Elizabeth Jordan* (3), was inconsistent with his previous decision; but that was not the appointment of a married woman, but the case of a feme sole making her will, in which case of course the rule applicable to wills in general would be put in force, namely, that the appointment of an executor primâ facie entitles a will to be admitted to proof. The case of the *Goods of Tharp* (4) was also referred to, but that was a case of personalty, and therefore the considerations are totally different.

It was also urged that some difference might arise in the practice of the Court since the Judicature Act, which undoubtedly gives larger powers, but it is to be observed that the Judicature Act has no effect whatever upon the non-contentious branch of the jurisdiction of this Court, and no question of the enlargement of the jurisdiction existing in the Court can arise in the non-contentious business. It can only be when a suit has been instituted that any such question can arise. I must, therefore, reject the application.

Solicitor: *Richard White.*

(1) 1 Sw. & Tr. 465.
(2) Law Rep. 1 P. & D. 325.
(3) Law Rep. 1 P. & D. 555.
(4) 3 P. D. 76.

R. A. P.

IN THE GOODS OF THE BARONESS VON BUSECK.

1881
August 3.

*Will—Foreigner—English Form—Execution—*24 & 25 *Vict. c.* 114—*Naturalization Act*, 1870.

A will of a foreigner executed abroad according to the formalities required by the English law is invalid, notwithstanding the provisions of 24 & 25 Vict. c. 114, and the Naturalization Act, 1870.

THE Baroness Caroline Von Buseck Von Altenbuseck, late of Homburg in Germany, widow, died having executed (amongst others) a will bearing date the 5th of September, 1876, and two codicils. The will was executed in accordance with the English law, and the codicils according to German law, and all three documents were executed in Germany. The deceased was born in England of English parents, but by her marriage had become German.

July 26. *Jeune*, for the executors, asked for probate of the will and codicils. The will though executed in Germany according to the English form, is valid either under the provisions of 24 & 25 Vict. c. 114 (1), as the will of a natural born British subject, for the deceased was by birth an Englishwoman, and has made the will according to the law of her domicil of origin, or under the 2nd section of the Naturalization Act, 1870 (2), which together with 24 & 25 Vict. c. 114, gives an alien the power to dispose of property in the same manner as a British subject. The codicils are valid as having been executed according to the law of the domicil of the deceased.

Cur. adv. vult.

Aug. 3. THE PRESIDENT after stating the facts said:—The question turns upon two enactments; the first is that commonly known as Lord Kingsdown's Act, 24 & 25 Vict. c. 114, and I should observe its title is "An Act to amend the law with respect to wills of personal estate made by British subjects," the first

(1) The material sections are set forth in the judgment.

(2) This section is set forth in the judgment.

held invalid
Bloxam v Favre 8 P.D. 101.

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section of which enacts that "every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death), shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions, where he had his domicil of origin."

It can, I think, scarcely be contended, that this Act is applicable to the case, because it is limited in the most careful manner to the wills of British subjects, and whatever question may arise in the case of a man, as to whether or not he has changed his nationality, there is no such question in the case of a woman who marries a foreigner; she thereby puts off her own original nationality, and takes that of her husband, and from thenceforth ceases to be in every sense of the word a British subject. But it was contended that the case is within this enactment by virtue of a statute which was passed as I conceive for totally different objects, the Naturalization Act, 1870, by the second section of which it is enacted that, "Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural born British subject, and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural born British subject."

It was contended that although this lady was an alien, she had the same right as a natural born British subject would have had, namely, to make a will according to the forms in force in that part of her Majesty's dominions, where she had her domicil of origin. But such an interpretation must, I think, be rejected, unless it were made quite plain that the English legislature intended, with reference to personal property, that an alien should be able to make a will, in a form which is not in conformity

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with the law of his own country. Of course an English Court might be compelled by plain language to give such a construction to an enactment, but it is not to be presumed that anything, which is so contrary to the comity of nations, has been intended by the English legislature, and therefore, I reject that as not being the meaning of this section.

On the other hand there is a very plain and intelligible meaning to be given to this Act, viz., that while it gives to aliens the same power to take, acquire, hold, and dispose of all real and personal property, in the same manner in all respects, as natural born British subjects, it does not deal with the question of what is to be the form of the will; which must depend upon other considerations. It leaves to be determined in each particular case, what is the form in which according to the law of the alien's country the testamentary disposition shall be carried out, and it gives an alien power to dispose in England of personalty by will, subject to the laws of his own country as to the form in which he shall make that will. This appears to me to be the plain and intelligible construction to be put upon this section, and I must therefore reject the application.

Solicitors: *Paterson, Snow, & Bloxam.*

R. A. P.

[IN THE FULL COURT.]

May 24.

JARDINE *v.* JARDINE.

Divorce—Permanent Maintenance—Weekly or Monthly Payments—Variation —29 Vict. c. 23.

The provisions of 29 Vict. c. 32, do not apply exclusively to the case of a poor man, and the Court may order sums of considerable amount to be paid weekly or monthly as permanent maintenance, and may from time to time modify the order.

THIS was an appeal from an order made by the President for permanent maintenance, after a decree for dissolution of marriage, by reason of the adultery and cruelty of the husband.

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JARDINE v. JARDINE.

Mr. Jardine was a diamond and jewel merchant and broker, and it appeared from the report of the registrar that he derived from other sources an income of about 422*l.* a year. As to his business the report stated that though very large profits had been made in former years—in one year as much as 18,000*l.*—there had been no profits for the last few years, and Mr. Jardine's capital now amounted to about 60,000*l.*, subject to realisation, which it was estimated would produce between 20,000*l.* and 30,000*l.* The report therefore submitted that the case should be dealt with as if Mr. Jardine had an income of 1600*l.* or 1700*l.* a year, and that 450*l.* a year, payable quarterly, should be allowed for the maintenance and education of the four youngest children of the marriage, and 400*l.* a year payable quarterly for the maintenance of Mrs. Jardine. His Lordship by his order increased the amount payable to Mrs. Jardine to 500*l.* a year, and in other respects confirmed the report. Mr. Jardine appealed against the order, so far as regarded the annuity to Mrs. Jardine, and asked that it should be reduced to 250*l.* a year.

Dr. Deane, Q.C., and *Dr. Tristram*, for the appellant. The amount is excessive, inasmuch as the Court has no power to diminish or alter it, for the order is made under the 32nd section of 20 & 21 Vict. c. 85, and can only be made under that section, as the 1st section of 29 Vict. c. 32 (1) is not applicable to the present case.

(1) The following are the material parts of the sections referred to :—

"The Court may . . . order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument, to be executed by all necessary parties": 20 & 21 Vict. c. 85, s. 32.

"Whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annnal sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives.

"In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly

Inderwick, Q.C., and *Pritchard*, for the respondent.

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LORD COLERIDGE, C.J. In this case it is clear that if Sir James Hannen had been asked in the first instance to act under the second Act of Parliament instead of under the first, he would have done so, and made this order an order for monthly payments. For myself it seems that where the marriage has been dissolved, it is difficult to make under the first Act an order that could be variable from time to time, and it was probably for that reason, and for the very purpose of providing for cases in which it was manifestly just and necessary to vary the order according to the altered circumstances of the husband, that the second Act was passed. It may be, that it was passed only for a poor man; but whether it was so or not, the words are abundantly sufficient to include the case of a person like the appellant, who has a large capital fairly and reasonably locked up in trade, so that it is not easy to secure upon it a fixed sum without doing that which of course it is most desirable not to do, namely, destroy the very means by which the trade is carried on. I should therefore have said that this was a case in which the very words of the second Act are clearly applicable, and the order will be made under that Act. As to the amount awarded by the President, all the evidence I have heard fails to raise any doubt in my mind that rebus sic stantibus this order is in any way wrong. It may be that with a variation in trade it may hereafter become wrong, and if so, being made, as it now will be under the second Act of Parliament, there is under that Act—if it is not given by the order itself—power to come from time to time to the Court to have the order varied according to the means of the husband. With that variation, I think the order should be affirmed.

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or weekly sums for her maintenance and support as the Court may think reasonable: Provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part as to the Court may seem fit": 29 Vict. c. 32, s. 1.

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SIR ROBERT PHILLIMORE. I concur, and for the same reasons think it ought to be affirmed.

THE PRESIDENT. I have the opinion of my Lord and my Brother judge that upon this evidence the amount that has been arrived at by me is correct; and my only reason for calling particular attention to it is this: that although the order is varied it must not be considered that rebus sic stantibus the husband is to come next month and ask that it be diminished. The view which I took of it at the time was this: this was a business of which it was impossible to estimate the profits, as most businesses are, annually; but it was necessary to ascertain them on a series of years. If that is the correct view, it will follow that this gentleman must not assume that he is entitled to come after only a short interval and apply that the amount may be reduced. I will not attempt to define what is a reasonable time, that will depend upon the circumstances, but a reasonable time must elapse before he can ask for a diminution of the allowance to the wife.

Order accordingly. The word "monthly" payments being substituted for "quarterly" payments. Petitioners' costs of appeal allowed.

Solicitor for appellant: *Sidney.*
Solicitor for respondent: *H. C. Coote.*

R. A. P.

IN THE GOODS OF BRAKE.

1881
April 5.

Will—Misdescription—Extrinsic Evidence.

A testator appointed William McC. of Canonbury, an executor. The only persons at all answering the description were Thomas McC. and William Abraham McC. :—

Held, that parol evidence was admissible to prove which person was intended by the testator. Probate granted to Thomas McC.

THOMAS CURTIS BRAKE, late of No. 107, Petherton Road, Highbury, in the county of Middlesex, Congregational minister, died on the 30th day of December, 1880.

The deceased made his will bearing date the 15th day of July, 1879, and therein appointed Henry Simmons, of Quadrant Road, Canonbury, and William McCormack, of Canonbury, executors.

Henry Ratliff Simmons and Thomas McCormack, applied for probate.

It appeared from the affidavits that the deceased told a Mr. Maidment, one of the attesting witnesses, that he wished Mr. Simmons and Mr. McCormack, two of the deacons of his chapel, to be his executors, and Mr. Maidment being under the impression that Mr. McCormack's Christian name was William, inserted it accordingly, that there never had been a deacon of the chapel of the name of William McCormack, but the only deacon of any similar name was Thomas McCormack, who had been one of the deacons for ten years. That Mr. McCormack had a son named William Abraham McCormack; but it did not appear that the deceased was acquainted with him.

Agabeg, in support of the motion, cited *In the Goods of Peel.* (1)

Cur. adv. vult.

HANNEN, J. In this case the testator appointed two persons

(1) Law Rep. 2 P. & D. 46.

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his executors, describing one of them as William McCormack, of Canonbury. There was not, in fact, any person of that name, but there was a person named William Abraham McCormack, and the question is, whether extraneous evidence is admissible to shew who was intended by the testator. I am of opinion that it is under proposition V. of Sir James Wigram's Treatise, and in accordance with what is said by Cairns, L.C. in *Charter* v. *Charter* (1): "The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably, and with sufficient certainty, applied."

The extraneous evidence shews that the only person of the name of McCormack of Canonbury, with whom the testator was acquainted, was Thomas McCormack. He is thus identified as the person intended by the testator. I therefore direct that probate be issued to him and Mr. Simmons as executors.

Solicitors: *W. J. Child & Son.*

(1) Law Rep. 7 E. & Ir. App. 364 at p. 377.

R. A. P.

NORMAN *v.* STRAINS. 1880 *Nov.* 30.

Will—Compromise—Married Women or Infants.

Semble. In an action as to the validity of a will when terms of compromise are agreed to by the parties who are sui juris, the Court of Probate will not make an order binding married women or infants to the terms of a compromise.

Elizabeth Atkinson Strains, wife of Werter Strains, died on the 2nd of March, 1880, having made a will whereby she appointed Edwin Norman, executor, and devised and bequeathed all her separate estate upon certain trusts for her husband Werter Strains for life, with remainder to her cousin Edwin James Denton and his wife, for life, with remainder to their children absolutely. A caveat on behalf of Mr. Werter Strains, was entered against proof of the will, and this caveat had been duly warned and an appearance entered. Subsequently he and Mr. and Mrs. Denton, executed an agreement as to terms of compromise.

Nov. 16. *Frank Safford*, on behalf of all the parties to the agreement and the infants, moved the Court to sanction the compromise and to order the terms to be filed. 20 & 21 Vict. c. 77, s. 25.

A. D. Tyssen, for the trustees.

Cur. adv. vult.

Nov. 30. The President. In this case I was asked to confirm an arrangement which has been entered into between the parties, so as to bind a married woman and certain infants.

It has been assumed by those who made the application, probably from some analogy to proceedings in the Chancery Division, that this Division was possessed of this case in the same manner. But that is not so. There has been no action commenced in this Division, for by the Judicature Act an action can only be commenced by issuing a writ, and no writ has been issued and therefore there is no litigation, and nothing upon which this Court could proceed. There has been a proceeding by caveat and warning, but they precede the writ.

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I am extremely unwilling, without knowing the circumstances, to bind infants to the consequences of a compromise which is entered into by the parties to a probate cause before me. I have really no means of forming any judgment upon the wisdom or prudence of the compromise. My duty is to determine whether or no a particular will is the will of the deceased person; but to enable me to say whether there were good grounds upon which counsel came to the conclusion that it would be prudent to make a compromise, it would be necessary that I should be informed of the facts of the case. I am always willing to give my assistance to counsel when I am consulted as to whether or no a particular arrangement should be carried out, but I always do so with this reservation that upon their statement, as far as I can judge, it seems to be expedient; and I do not thereby intend to bind infants or any persons other than those who are parties to the compromise. I have made these observations as a guide in future cases, but, for the present, it is sufficient to say I am asked to sanction an arrangement in a cause which does not even exist.

Solicitors for plaintiff: *Brighten, Parker, & Norman.*
Solicitor for trustees: *T. W. Rogers.*

R. A. P.

ORDER IN COUNCIL,

Gazetted the 2nd of September, 1881.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

AT THE COURT AT HOLYROOD PALACE,

the 26th day of August, 1881.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS, by Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 14th day of August, 1879, Her Majesty, on the joint recommendation of the Admiralty and the Board of Trade, was pleased to direct that on and after the 1st day of September, 1880, the Regulations for Preventing Collisions at Sea, contained in an Order in Council dated the 9th day of January, 1863, and the additions by an Order in Council dated the 30th day of June, 1868, made thereto, should be annulled, and that there should be substituted therefor the new Regulations contained in the first schedule to the said first-named Order in Council, and that the same should from and after the 1st day of September, 1880, apply to ships of the countries mentioned in the said second schedule thereto, whether within British jurisdiction or not:

And whereas, by an Order in Council, dated the 24th of March, 1880, Her Majesty was pleased to direct that the operation of the Article numbered 10 of the new Regulations contained in the

first schedule of the said Order in Council of the 14th day of August, 1879, should be suspended until the 1st day of September, 1881, and that in lieu thereof, and in substitution therefor the Article numbered 9 of the Regulations appended to the said Order in Council of the 9th day of January, 1863, should continue and remain in force until the said 1st day of September, 1881.

And whereas the Admiralty and the Board of Trade have jointly recommended to Her Majesty that the operation of the said Article numbered 10 should be further suspended until the 1st day of September, 1882, and that in lieu thereof and in substitution therefor the said Article numbered 9 shall continue and remain in force until the said 1st day of September, 1882.

Now, therefore, Her Majesty, by virtue of the powers vested in Her by the said recited Act, and by and with the advice of Her Privy Council, is pleased to direct, that the operation of the said Article numbered 10 of the new Regulations contained in the first schedule of the said Order in Council of the 14th day of August, 1879, shall be suspended until the 1st day of September, 1882, and that in lieu thereof and in substitution therefor the said Article numbered 9 of the Regulations appended to the said Order in Council of the 9th day of January, 1863, shall continue and remain in force until the 1st day of September, 1882.

C. L. Peel.

ADDITIONAL RULES

(APPEALS AND REHEARINGS)

AS TO

INVESTIGATIONS INTO SHIPPING CASUALTIES.

1880.

THE MERCHANT SHIPPING ACT, 1876, 39 & 40 VICT., CAP. 80.

THE SHIPPING CASUALTIES INVESTIGATIONS ACT, 1879, 42 & 43 VICT., CAP. 72.

Under the authority of the above-mentioned Acts, I, the Right Honourable Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, hereby make the following General Rules:—

Short Title.

1. These Rules may be cited as "The Shipping Casualties (Appeal and Rehearing) Rules, 1880."

Commencement.

2. These Rules shall come into operation on the 21st day of April, 1880.

Interpretation.

3. In the construction of these Rules the word "Judge" shall mean the Wreck Commissioner, Stipendiary Magistrate, Justices, or other authority empowered to hold an investigation into the conduct of a master, mate, or engineer, or into a shipping casualty.

Publication of Rules.

4. These Rules shall be published by Her Majesty's Stationery Office, through its agents, and a copy shall be kept at every Custom House and Mercantile Marine Office in the United Kingdom, and any person desiring to peruse them there shall be entitled to do so.

Copy of Report where Certificate affected.

5. Where the certificate of a master, mate, or engineer has been cancelled or suspended, the Board of Trade shall, on application by any party to the proceedings, give him a copy of the report made to the Board.

Appeals.

6. Every appeal under section two of "The Shipping Casualties Investigations Act, 1879," shall be subject to the conditions and regulations following, namely:—

(*a.*) The appellant shall, within seven days after the day on which the decision appealed against is pronounced, serve on such of the other parties to the proceedings as he may consider to be directly affected by the appeal, notice of his intention to appeal, and shall also, within two days after the appeal is set down, serve on the said parties notice of the general grounds of the appeal.

(*b.*) If the appeal is brought by any party other than the Board of Trade, the appellant shall give such security, if any, by deposit of money or otherwise, for the costs to be occasioned by the appeal, as the Judge from whose decision the appeal is brought, on application made to him for that purpose, may direct.

(*c.*) The appellant shall, before the expiration of the time within which notice of appeal may be given, leave with the officer for the time being appointed for that purpose by the Court to which the appeal is brought (in these Rules referred to as the Court of Appeal) a copy of the notice of appeal, and the officer shall thereupon set down the appeal by entering it in the proper list.

(*d.*) The Court of Appeal shall be assisted by not less than two Assessors, to be selected, in the discretion of the Court, having regard to the nature of each case, from either or both of the following classes:—

1. Elder Brethren of the Trinity House.
2. Persons approved from time to time by the Secretary of State as Assessors for the purpose of formal investigations into shipping casualties, under section thirty of the "Merchant Shipping Act, 1876," and sub-section one of section three of the "Shipping Casualties Investigations Act, 1879."

(*e.*) The Court of Appeal may, if it thinks fit, order any other person or persons, body or bodies, other than the parties served with the notice of appeal, to be added as a party or parties to the proceedings for the purposes of the appeal, on such terms with respect to costs and otherwise as to the Court of Appeal seems meet.

(*f.*) Any party to the proceedings may object to the appearance on the appeal of any other party to the proceedings as unnecessary.

(*g.*) The evidence taken before the Judge from whose decision the appeal is brought shall be proved before the Court of Appeal by a copy of the notes of the Judge, or of the shorthand writer, clerk, secretary, or other person authorized by him to take down the evidence, or by such other materials as the Court of Appeal thinks expedient; and a copy of the evidence, and of the report to the Board of Trade containing the decision from which the appeal is brought, and of the notice of the general grounds of the appeal, shall be left with the officer for the time being appointed for that purpose by the Court of Appeal before the appeal comes on for hearing. For the purpose of this rule, copies of the notes of the evidence, and of the report, shall be supplied to the appellant, on request, by the Judge or other person having charge thereof, on payment of the usual charge for copying.

(*h.*) The Court of Appeal shall have full power to receive further evidence on questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Evidence may also be given with special leave of the Court of Appeal as to matters which have occurred since the date of the decision from which the appeal is brought.

(*i.*) The Court of Appeal shall have power to make such order as to the whole or any part of the costs of and occasioned by the appeal as may seem just.

(*j.*) Subject to the foregoing provisions of this Rule, every appeal shall be conducted under and in accordance with the general rules and regulations applicable to ordinary proceedings before the Court of Appeal to which it is brought; but there shall not be anything in the nature of pleadings, other than the notice of the general grounds of the appeal, except by special permission of the Court of Appeal.

(*k.*) On the conclusion of an appeal, the Court of Appeal shall send to the Board of Trade a report of the case, similar to that required to be sent by the Judge from whose decision the appeal is brought.

Rehearings by Order of Board of Trade.

7. (*a.*) Where the Board of Trade direct a rehearing under section two of the "Shipping Casualties Investigations Act, 1879," they shall cause such reasonable notice to be given to the parties whom they consider to be affected by the rehearing as the circumstances of the case may, in the opinion of the Board of Trade, permit.

(*b.*) The provisions distinguished as (*d*), (*e*), (*f*), (*g*), (*h*), (*i*), (*j*), and (*k*) of the last foregoing Rule shall apply to a rehearing as if it were an appeal, and as if the Court or authority before whom the rehearing takes place were the Court of Appeal.

Dated this 17th day of April, 1880.

Cairns, C.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1881, will be as follows:—

In the First Series,
18 Ch. D.

In the Second Series
7 Q. B. D. 6 P. D.

In the Third Series,
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4. —— *Conditional.*] A testator being about to travel made his will, which contained the following words: "On leaving this station for T. and M., in case of my death on the way, know all men this a memorandum of my last will and testament:"—*Held*, that the will was not contingent upon his death before arriving at T. or M. Will admitted to probate. In the Goods of Mayd - - - - - - 17

5. —— *Contents—Parol Evidence of Intention.*] Statements of a testatrix, whether made before or after the execution of the will, are admissible to shew what papers constitute the will. Gould *v.* Lakes - - - - - - 1

6. —— *Foreigner—English Form—Execution—24 & 25 Vict. c. 114—Naturalization Act*, 1870.] A will of a foreigner executed abroad according to the formalties required by the English law is invalid, notwithstanding the provisions of 24 & 25 Vict. c. 114, and the Naturalization Act, 1870. In the Goods of von Buseck - - 211

7. —— *Gift of Residue—"Money, Stocks, Funds, or other Securities."*] A gift of "such money, stocks, funds, or other securities, not hereafter specially devised, as I may die possessed of," does not constitute a gift of residue. In the Goods of Aston - - - - 203

8. —— *Incorporation.*] S. M. H. while a married woman made a will which was invalid. Afterwards when a widow, she executed a document beginning with the words, "this is a codicil to the last will and testament of me." The codicil was written on the same paper as the will and immediately after it, and it was proved that she had made no other will. *Held*, that the will was incorporated in the codicil. Probate granted of both documents. In the Goods of Heathcote - - - - - - 30

9. —— *Married woman Executrix—Husband's assent to Probate—20 & 21 Vict. c. 77, s. 73.*] A married woman having been appointed sole exe-

WILL—*continued.*

cutrix of a will and universal legatee, her husband objected to her taking probate. The Court, under s. 73 of 20 & 21 Vict. c. 77, made the grant to her attorney:—*Quære*, whether a husband has an absolute right to object to his wife's taking probate of a will of which she is executrix. Clerke *v.* Clerke - - - - - 103

10. —— *Married Woman—Protection Order—Wife's Lifetime—Action to prove Will and to discharge Order.*] An application to discharge a protection order is not limited to the lifetime of the married woman.—A claim to pronounce against the validity of the will of a married woman who had obtained a protection order, and a counterclaim to discharge the protection order, may be included in the same action. Mudge *v.* Adams 54

11. —— *Misdescription—Extrinsic Evidence.*] A testator appointed William McC. of Canonbury, an executor. The only persons at all answering the description were Thomas McC. and William Abraham McC.:—*Held*, that parol evidence was admissible to prove which person was intended by the testator. Probate granted to Thomas McC. In the Goods of Brake - - 217

12. —— *Mistake—Duplicate—Execution.*] An intended will was written in duplicate, one copy of which was signed only by the deceased and the other only by the attesting witnesses:—*Held*, that neither paper was entitled to probate. In the Goods of Hatton - - - 204

13. —— *Mistake—Revival—Revocation.*] A testator made a will, and afterwards another, which by implication revoked the former will, Subsequently, by the terms of a duly executed codicil, he by mistake, referred to the former instead of the later will:—*Held*, that the codicil by its language, revived the former will, and that as the later will was not revoked by the codicil all three documents must be admitted to probate. In the Goods of Stedham. In the Goods of Dyke - - - - - - 205

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CONFLICT OF LAWS—*Divorce in England between domiciled Scotchman and Englishwoman—Divorce in Scotland by reason of Husband's Adultery only — Validity.*] The English Divorce Court will recognise as valid the decree of a Scotch Court dissolving the marriage of a domiciled Scotchman and an Englishwoman, although the marriage was solemnized in England, and the marriage was dissolved upon a ground for which by English law no divorce could have been granted.—The question of divorce is not an incident of the marriage contract to be governed by the lex loci contractus, but is an incident of status to be disposed of by the law of the domicil of the parties — that is of the husbands: *Lolley's Case* (Russ. & Ry. 237; 2 Cl. & F. 567 distinguished; *M'Carthy* v. *De Caix* (2 Russ. & My. 614; 2 Cl. & F. 568) examined and explained. Harvey v. Farnie 35

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DIVORCE—*Permanent Maintenance—Weekly or Monthly Payments—Variation—29 Vict. c.* 23.] The provisions of 29 Vict. c. 32 do not apply exclusively to the case of a poor man, and the Court may order sums of considerable amount to be paid weekly or monthly as permanent maintenance, and may from time to time modify the order. Jardine *v.* Jardine - - - - 213

LUNACY—*Dissolution of Marriage—Lunatic Petitioner—Committee.*] The lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage.—Such a suit may be instituted by the committee of the lunatic. Baker *v.* Baker - - - 12

MAINTENANCE—Divorce—Weekly or monthly payments - - - - 213
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—— Right of wife—Separation deed—Subsequent divorce - - - - 98
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NULLITY—*Application by Respondent to make Decree absolute.*] The Court will not upon the application of the respondent make a decree nisi absolute for nullity of marriage by reason of the impotence of the respondent. Halfen *v.* Boddington - - - - - 13

PETITION — Withdrawal of—Filing of second petition - - - - 10
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PRACTICE—*Affidavit verifying Petition.*] A petitioner in a divorce suit being on military service, and unable to make the usual affidavit verifying the petition, the Court allowed the petition to be filed if verified by the affidavit, of his solicitor, but ordered that the petitioners affidavit should also be filed as soon as possible. Ex parte Bruce 16

2. —— *Wife's Costs—Limit.*] In a divorce suit, the costs of the wife payable by the husband are not limited to the amount paid into court or secured by the husband for that purpose.—Order of the Divorce Court varied. Robertson *v.* Robertson - - - - C. A. 119

PRACTICE—*continued.*

3. —— *Decree Nisi—Re-marriage before Decree absolute.*] A. R. W. obtained in 1868 a decree nisi for dissolution of her marriage, and in 1871, believing that the decree had been made absolute, she married again.—The Court, the Queen's Proctor not opposing, made the decree absolute. Wickham *v.* Wickham - - - - 11

4. —— *Petition filed after Desertion for a few Months—Second Petition after Desertion for Two Years.*] A wife's petition for dissolution of marriage by reason of cruelty and adultery was, by leave of the Court, withdrawn, and petition afterwards filed for dissolution of marriage by reason of the same adultery and also by reason of desertion for two years, which had not accrued at the date of the first petition. Knapp *v.* Knapp 10

PRACTICE—*continued.*

SEPARATION, DEED OF—*Maintenance—Subsequent Adultery—Further Maintenance.*] A wife, by a deed of separation, agreed to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance. Subsequently having discovered that he had been guilty of incestuous adultery, she obtained a decree for dissolution of the marriage:—*Held*, that notwithstanding the deed, she was entitled to the usual order for permanent maintenance. Morrall *v.* Morrall - - - - - 98

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ECCLESIASTICAL LAW—*Church Discipline Act* (3 & 4 *Vict. c.* 86)—*Contumacious Clerk—Continuous Offences against Ritual—Deprivation ab officio et a beneficio—Practice.*] The Official Principal of the Court of Arches has jurisdiction to deprive ab officio et beneficio a clergyman in holy orders holding a benefice in the province of Canterbury who has been articled against in a criminal suit in the Court of Arches by virtue of letters of request under the Church Discipline Act, and is in such suit proved to have been guilty within two years of the institution of the suit of contumacy, of incorrigible disobedience to the Ordinary and to the Canons of the Church, and of having failed to observe the Book of Common Prayer. Combe *v.* De la Bere - 157

2. —— *Church Discipline Act* (3 & 4 *Vict. c.* 86)—*Offences against Ritual—Disobedience to*

ECCLESIASTICAL LAW—*continued.*

Monitions—Suit for Deprivation—Discretion of Court as to its Sentences.] The articles, exhibited in a suit by letters of request under the Church Discipline Act, charged that the respondent, the incumbent of a parish church, had within two years of the institution of the suit whilst officiating in the performance of Divine service in his parish church, committed certain offences in matters of ritual, the same being repetitions of offences from which he had been admonished to abstain by monitions issued in previous suits, and prayed that the respondent should be deprived ab officio et beneficio.—At the time of the hearing of the suit, a decree of suspension pronounced in one of the previous suits above mentioned, and suspending the respondent ab officio et beneficio was in force and unrelaxed, but no future proceedings to enforce such sentence had been taken. The Court, though holding the articles proved, refused in its discretion to pronounce a sentence of deprivation. Martin *v.* Mackonochie - 87

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COUNTY COURT—*Practice—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 11—*Province of Nautical Assessors.*] Nautical assessors summoned under the County Court Admiralty Jurisdiction Act, 1868, to attend at the hearing of an Admiralty action tried by a county court judge, are present merely to advise the judge, and the judge ought to decide the case in accordance with his own opinion as to the law and merits of the case. The Aid - - 84

CUSTOM—Port of discharge—Evidence - 68
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DAMAGE—*Collision—Contributory Negligence—Damages—Infringement of Thames By-laws—Cause of Action.*] A dumb barge, by the negligent navigation of those in charge of her, was suffered to come into contact with a schooner moored to a mooring buoy in the river Thames. The schooner had her anchor hanging over her

DAMAGE—*continued.*

bow with the stock above water, contrary to the Thames by-laws. The anchor made a hole in the barge and caused damage to her cargo. But for the improper position of the anchor neither the barge nor her cargo would have received any damage. In an action of damage by the owners of the barge against the schooner:—*Held*, reversing the decision of the Admiralty Court, that both vessels were to blame, and that therefore the owners of the barge were entitled to half the damage sustained. The Margaret C. A. 76

2. —— *Inevitable Accident—Costs—Infringement of Regulations for Preventing Collisions at Sea — Arts.* 5, 6 — *The Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.] A sailing ship in a gale drove from her anchors across a sand, and her rudder was so damaged as to render the ship unmanageable; in this condition she came into collision after sunset with a brig at anchor. At the time of the collision the ship had her anchor light exhibited and no other light. In an action of damage by the owners of the brig against the ship it was held that the collision was occasioned by inevitable accident, and that the ship in the circumstances of the case was not to be deemed in fault for not carrying side lights or the three red lights prescribed by Article 5 of the Regulations for Preventing Collisions at Sea, and that the suit ought to be dismissed without costs. The Buckhurst - - - 152

3. —— *Law applicable in Case of Collision between British and Foreign Vessel.*] In an action in personam, brought by the owners of a British vessel against the owners of a Spanish vessel to recover damages caused to the British vessel by collision with the Spanish vessel on the high seas, the defendants pleaded that they were Spanish subjects, and that if there was any negligence on the part of those in charge of the Spanish vessel it was negligence for which the master and crew alone, and not the defendants, were liable according to the law of Spain:—*Held*, bad on demurrer. The Leon - - 148

4. —— *Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17—*Regulations for Preventing Collisions at Sea, Articles* 12, 13, 18—*Infringement of Regulations.*] A barque, provided only with a fog-horn, sounded by means of the breath, came into collision, during a fog, with a steamship. The fog-horn was duly sounded before the collision, and was heard by those on board the steamship, and those on board the steamship neglected, for some time after they heard the fog-horn, to stop or reverse the engines. The steamship was held to blame, The barque was held to be deemed in fault for not using a fog-horn, to be sounded by mechanical means, as required by Article 12 of the Regulations for Preventing Collisions at Sea, 1879.—The circumstance that the barque left port a few days before the regulations came into force was held not to afford any valid excuse for the neglect of those in charge of her to furnish her with a fog-horn, to be sounded by mechanical means, they well knowing, before she left port, that the regulations would come into force in a few days, and there being no evidence to shew that they could not obtain a fog-horn, according to the regulations, before she left port. The Love Bird - - - - 80

5. —— *Practice—Tribunal to decide Questions of Consequential Damage.*] Although it is the usual practice of the Court in collision cases to refer all questions involving the amount of damages to the registrar assisted by merchants, yet when consequential damages are claimed, it is in the discretion of the Court to deal at the hearing of the action, with the question whether such damages are recoverable. The Maid of Kent - - - - - - 178

—— Rules for navigation of Thames - 139
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—— Limitation of liability—Tonnage of ship
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DERELICT—Abandonment by salvors—Distribution of salvage reward - - 193
See Salvage.

EVIDENCE—Custom—Port of discharge - 68
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FOREIGN JUDGMENT—*Ship—Maritime Lien—Jurisdiction—Action in rem to enforce Judgment of Foreign Tribunal of Commerce.*] The plaintiffs brought an action and obtained judgment in the Tribunal of Commerce at Lisbon against the captain and owners of a British ship for damages for injury caused by a collision with the plaintiffs' ship. The Portuguese Courts recognise no distinction between actions in personam and actions in rem. The defendants' ship having come into a British Court the plaintiffs commenced an action in rem against the ship, claiming to enforce the judgment of the Portuguese Court against it, and arrested the ship:—*Held*, reversing the decision of Sir R. Phillimore, that the action in the Portuguese Court was a personal action, and that the writ in the present action and all proceedings under it must be set aside, the Court having no jurisdiction to enforce a judgment in a personal action by proceedings in rem. — All civilised nations recognise the validity of maritime lien, and will enforce it when it has been declared by a foreign Court; but it is essential that it should appear from the proceedings of the foreign Court that the object of the suit was the sale of the ship, and not a personal remedy against the captain or owners.—*The Bold Buccleugh* (7 Moo. P. C. 267) considered. The City of Mecca - - 106

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LIEN—Maritime—Foreign judgment - 106
See Foreign Judgment.

LIMITATION OF LIABILITY—*Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*Limit of Liability dependent upon Tonnage of Ship at Time of Collision.*] In a suit of limitation of

LIMITATION OF LIABILITY—*continued.*
liability in respect of damage arising from a collision, the shipowners claimed deductions on account of screw space which appeared on the register of their vessel at the time of their application for a decree:—*Held*, that they were not entitled to the benefit of any deductions not appearing on the register in force at the time of the collision. The John McIntyre - 200

2. —— *Shipowner—Wrong-doer—Salvage—Cargo—Thames Conservancy—Powers under Two Acts of Parliament.*] The payment into court of 8*l.* a ton under 25 & 26 Vict. c. 54, does not place the shipowner in the position of a person who has not done wrong.—The owner of a ship sunk by a collision in the Thames admitted it to be his fault, and paid into Court 8*l.* a ton in a suit to limit his liability. The Thames Conservators, having powers under the Removal of Wrecks Act, 1877, and the Thames Conservancy Acts, raised the ship and delivered the ship and cargo to the owner, he undertaking to pay the expenses of raising. Part of the cargo was some wool, which was damaged by being sunk:—*Held*, that the shipowner was bound to deliver the wool to the owner of the wool without claiming from him, by way of contribution to salvage, any part of the expenses of raising the ship and cargo.—Where a public body has powers under two Acts, it must be taken to have proceeded under that which gave it most advantages. Prehn *v.* Bailey. The Ettrick
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—— Wreck Commissioner—Shipping casualty—Appeal—Evidence—Costs - 182
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SAILING RULES—Articles, 12, 13, 18. - 80
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SALVAGE—*Abandonment of Derelict by Salvors—Waiver of Salvage—Remuneration—Amount of Award.*] The barque *N.* fell in with the *K.*, a derelict barque, in the Atlantic, and put five hands on board of her who navigated her for three days. The *K.* then fell in with the barque *B.*, and the five hands on board of the *K.* were, at their own request, taken on board the *B.* The *B.* then sent some of her own crew on board the *K.*, and took her in tow, and towed her until the tow-rope broke, when the vessels parted company, and the hands on board the *K.*, with the assistance of the *L.*, a steamship which they afterwards fell in with, brought the *K.* into Falmouth. In suits instituted on behalf of the masters, owners, and crews of the *N.*, the *B.*, and the *L.*, the Court held, that the master, owners, and crew of the *N.* were not entitled to salvage award, but awarded salvage to the remaining plaintiffs. The Killeena - - - - - 193

2. —— *Bullion liable to contribute in the same proportion as other Property.*] Where steam tugs rendered salvage services by towing a sinking vessel with passengers, cargo, and bullion on board into safety, it was held, that the bullion was liable to contribute to the salvage reward in proportion to its value rateably with the other property salved. The Longford - - 60

SHIP—*Charterparty—Meaning of words "Safe Port, or as near thereunto as she can safely get, and always lay and discharge afloat"—Rights of Parties when Ship is unable to lie afloat in Port of discharge without being lightened—Evidence of custom of Port.*] Where a vessel is chartered to proceed with cargo to a "safe port . . . . as ordered, or as near thereunto as she can safely get, and always lay and discharge afloat," the master is not bound to discharge at a port where she cannot, by reason of her draught of water, "always lie and discharge afloat" without being lightened, even if she can be lightened with reasonable dispatch and safety in the immediate vicinity of the port or in the port itself. A vessel was chartered to proceed with a cargo of grain from Baltimore to Falmouth for orders, "thence to a safe port in the United Kingdom as ordered, or as near thereunto as she could safely get, and always lay and discharge afloat." The vessel was ordered to Lowestoft. Her draught of water when loaded was such that she could not lie afloat in Lowestoft Harbour without discharging a portion of her cargo, but the discharge of cargo might have been carried on with reasonable safety in Lowestoft Roads. The consignee offered at his own expense to lighten the vessel in the roads, but the master refused to proceed to Lowestoft to discharge, and went to Harwich as the nearest safe port, and there discharged the cargo:—*Held*, reversing the decision of Sir R. Phillimore, that the consignee could not recover damages against the shipowner for the refusal of the master to discharge at Lowestoft. *Held*, also, that evidence that it was the custom of the port of Lowestoft for vessels to be lightened in the roads before proceeding into the harbour was not admissible. The Alhambra - 68

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42 & 43 Vict. c. 72, s. 2 - - - 182
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THAMES—*Rules for the Navigation of the Thames—Rules 22 and 23—Coming to Points—Porting.*] The 22nd and 23rd rules for the navigation of the Thames are not inconsistent, and the intention is that when the 23rd rule (as to passing a point) applies, the case for the 22nd (as to porting) shall not arise, but if the case does arise the rule will apply. A steam vessel coming down the Thames against tide to a point on the north shore, and being nearer to mid-channel than to the north shore, eased, and then seeing danger of collision with a vessel coming up with tide, starboarded and reversed. The other vessel was com-

THAMES—*continued.*
ing up with the tide also near the north shore and rounded the point under a port helm; seeing the other vessel, she ported hard, and stopped, but a collision occurred:—*Held*, that under the circumstances the 22nd rule applied, and that the vessel which had starboarded was to blame. By Jessel, M.R., and Brett, L.J. (Cotton, L.J., doubting), that under the 23rd rule the vessel navigating against tide is to wait until she has been passed by the other vessel, and not merely until the other vessel has passed the point. The Libra [C. A. 139

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WORDS—"Safe port or as near thereunto as she can safely get" - - - 68
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WRECK COMMISSIONER—*Shipping Casualty Appeal—Shipping Casualty Investigation Act*, 1879 (42 & 43 *Vict. c.* 72), *s.* 2—*Materials on which Appeal heard—Practice—Evidence of Experts not admissible on Questions of Nautical Skill and Knowledge—Costs.*] Although the Wreck Commissioner, or other authority, holding a formal investigation into a shipping casualty under the Merchant Shipping Acts, must, if he deals with the certificate of a master or certified officer, give his decision in open court, yet he may, subsequently in his report to the Board of Trade, state reasons for his decision not mentioned by him at the time when the judgment was delivered.—In appeals under the Shipping Casualties Investigations Act, 1879, the Court of Appeal will not permit witnesses to be called to give evidence on questions of nautical knowledge and skill.—Where, on an appeal under the Shipping Casualties Investigations Act, 1879, the decision of the Wreck Commissioner, suspending the certificate of a master, was affirmed, but the Court of Appeal recommended that the Board of Trade should shorten the time for which the certificate had been suspended, the parties to the appeal were left to bear their own costs of the appeal. The Kestrel - - - - - - 182

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

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OL 24 MAY 1967